No. 23-1394

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSE HAMMONS,

Plaintiff-Appellant,

v.

UNIVERSITY OF MARYLAND MEDICAL SYSTEM CORP., ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
No. 20-cv-02088

APPELLEES' MOTION TO SUMMARILY DISMISS FOR LACK OF JURISDICTION

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Counsel for Appellees

INTRODUCTION

Plaintiff Jesse Hammons has purported to appeal the final judgment entered below. But Hammons *won* below. The district court granted summary judgment *in his favor*, agreeing that all three Defendants were liable under Section 1557 of the Affordable Care Act, 42 U.S.C. § 18116(a), for cancelling Hammons' hysterectomy. D. Ct. Dkt. 122. The parties *stipulated* to Hammons' damages (D. Ct. Dkt. 128); the court entered final judgment accordingly (D. Ct. Dkt. 133). And Defendants have since *paid* the judgment. It is axiomatic, "a general rule," that "a prevailing party cannot appeal from a district court judgment in its favor." *Chesapeake B & M, Inc. v. Harford Cnty.*, 58 F.3d 1005, 1011 (4th Cir. 1995). This Court lacks jurisdiction over such an appeal, because it presents no live controversy between the parties.

Hammons appears to be trying to contest the district court's earlier rejection of his alternative *constitutional* theories. But that issue is now academic—mooted by the fact that Hammons has secured *exactly the same relief* on statutory grounds. He sued based on a single injury (cancellation of his surgery), seeking compensatory damages (the lost earnings suffered as a result). He won a judgment awarding that full relief. That success has eliminated Hammons' concrete stake in this dispute, as he would gain nothing further even if this Court held that his constitutional theories were viable. Plaintiff lacks standing to appeal; this case is quintessentially moot. This Court should therefore dismiss it—and do so now, at the threshold.

BACKGROUND

This case arises from the cancellation of Hammons' hysterectomy, which had been scheduled to occur at the University of Maryland St. Joseph Medical Center ("St. Joseph"), a hospital in Towson, Maryland. Hammons' surgery was intended to treat gender dysphoria. St. Joseph is a Catholic hospital, however, and observes the Ethical and Religious Directives for Catholic Health Care Services ("ERDs"), which forbid performing surgery for purposes of gender transition. The procedure was therefore cancelled. *See* D. Ct. Dkt. 121 ("SJ Op."), at 6-10 (Exh. C).

Hammons sued the two entities that operate St. Joseph (namely, the University of Maryland St. Joseph Medical Center, LLC, and UMSJ Health System, LLC) and their parent company, the University of Maryland Medical System ("UMMS"). He alleged that the cancellation forced him to reschedule the procedure for another day elsewhere, resulting in monetary loss. D. Ct. Dkt. 1 ("Compl."), ¶ 60. He sought recovery for that injury on both constitutional and statutory legal theories. *First*, Hammons asserted that the cancellation of the surgery violated the Establishment Clause and the Equal Protection Clause. *Id.* ¶¶ 67, 74, 79-80. *Second*, Hammons asserted that the cancellation was discrimination on the basis of sex, in violation of Section 1557 of the Affordable Care Act ("ACA"). *Id.* ¶ 89. Hammons had standing to pursue these claims because the "cancellation of Plaintiff's surgery constituted injury," redressable by "money damages." D. Ct. Dkt. 52 at 12, 16 (Exh. B).

At the pleading stage, the district court dismissed the constitutional claims. *Id.* at 31-41. But the court declined to dismiss the ACA claim. *See id.* at 42-49. The case proceeded to discovery, and the parties then filed cross-motions for summary judgment. Hammons argued that Defendants cancelled his surgery "because it 'was meant to treat his gender dysphoria,'" and "this constitutes discrimination on the basis of sex" in violation of Section 1557. SJ Op. 13. The court agreed, rejected Defendants' arguments, and granted Hammons summary judgment. *Id.* at 51.

Following the liability order, the parties stipulated that Hammons' damages (his lost earnings) totaled $748.46, and also stipulated to prejudgment interest. D. Ct. Dkt. 128. On March 13, 2023, the court entered final judgment in the total agreed amount of $874.63. D. Ct. Dkt. 133. The parties agreed to defer the reimbursement of attorneys' fees until after any appeals. D. Ct. Dkt. 134, 135. Defendants have since paid the judgment in full. *See* Exh. A (correspondence).

Despite prevailing below, Hammons noticed an appeal, seeking review of the dismissal of his constitutional claims. D. Ct. Dkt. 136.[1] Defendants now move to summarily dismiss for lack of jurisdiction. *See* 4th Cir. R. 27(f)(2). They advised Hammons of their intention to bring this motion; he intends to oppose it.

[1] Depending on the timing of the Court's resolution of this motion, Defendants may notice a conditional cross-appeal to preserve their right to challenge the adverse judgment in the event this Court concludes that Hammons' appeal is not moot. To be clear, Defendants otherwise do not challenge that judgment; if the Court grants this motion, any conditional cross-appeal will automatically also be dismissed.

ARGUMENT

This case is classically moot. The only concrete injury Plaintiff ever asserted was the cancellation of his surgery. The district court agreed that the cancellation was unlawful, and awarded Hammons a final judgment against all Defendants for the only relief he sought (compensatory damages for his lost earnings). Defendants did not seek to disturb that final judgment—they paid it. Hammons therefore has no standing to pursue an appeal. At this juncture, his alternative constitutional theories present only abstract and academic questions, with no practical significance, and this Court lacks jurisdiction to consider those questions in this posture.

I. Article III conditions the "exercise of judicial power … on the existence of a case or controversy." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). That means a plaintiff must suffer an injury that "can be redressed by a favorable judicial decision." *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983); *see id.* (appeal moot where "no resolution … can redress [the] asserted grievance"). And because "federal courts may adjudicate only actual, ongoing cases or controversies," the plaintiff must maintain that "concrete" stake at "all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-79 (1990). That standing requirement "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997).

As this Court has recognized, a plaintiff loses his "'personal stake in the outcome' of the lawsuit," *Lewis*, 494 U.S. at 478—and so lacks standing to proceed further—"when [he] receives the relief sought in his … claim," *Williams v. Ozmint*, 716 F.3d 801, 809 (4th Cir. 2013). In *Williams*, for example, the appeal was moot because the inmate "already ha[d] received the restoration of his visitation privileges that he requested." *Id.* In another case, this Court dismissed an appeal because the State gave the plaintiffs "the 'precise relief' they sought" by withdrawing the challenged executive orders. *Eden, LLC v. Justice*, 36 F.4th 166, 170 & n.3 (4th Cir. 2022). And in a third example, this Court dismissed a federal appeal as moot after a state court in parallel litigation provided all the relief that would have been possible. *See Friedman's, Inc. v. Dunlap*, 290 F.3d 191, 197 (4th Cir. 2002).

Most pertinent here, a plaintiff's claims become moot if the plaintiff prevails on an alternative claim that triggers the same relief for the same injury. This Court so held in *Waterman v. Alta Verde Industries, Inc.*, 833 F.2d 1006, 1987 WL 39014 (4th Cir. 1987) (per curiam), where a plaintiff challenged the sale of an unregistered security under both federal and state law, losing the former but winning the latter. *See id.* at *1. This Court recognized that the plaintiff's appeal on the federal claim was "moot" given that the plaintiff had prevailed on a state-law claim that "provides a similar remedy," namely rescission of the sale, and a plaintiff "is not entitled to double recovery." *Id.* at *1-2.

Other circuits have reached the same conclusion on similar fact patterns. *See, e.g.*, *Miller v. Travis Cnty.*, 953 F.3d 817, 819, 822 (5th Cir. 2020) (constitutional claim moot in light of affirmance on FLSA claim, because plaintiff cannot recover twice for same injury); *Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 383 (7th Cir. 2018) (where plaintiff settles a claim "for the full relief available for a single, indivisible injury," other claim "for the same injury" is moot); *Garity v. Brennan*, 845 F. App'x 664, 665 (9th Cir. 2021) (appeal on Title VII claim moot in light of recovery on Rehabilitation Act claim for same relief); *Ridgell-Boltz v. Colvin*, 565 F. App'x 680, 684 (10th Cir. 2014) (where plaintiff "sought relief for only one injury" and prevailed on Title VII *retaliatory*-discharge claim, appeal on Title VII *discriminatory*-discharge claim was moot).

This rule follows from the basic principle that a plaintiff may not recover twice for the same injury. It is "[a] basic principle of compensatory damages … that an injury can be compensated only once. If two causes of action provide a legal theory for compensating one injury, only one recovery may be obtained." *Bender v. City of N.Y.*, 78 F.3d 787, 793 (2d Cir. 1996); *see, e.g.*, *Dionne v. Mayor & City Council of Balt.*, 40 F.3d 677, 685 (4th Cir. 1994). As such, once a plaintiff has been fully compensated for an injury on one legal theory, the plaintiff cannot press other claims or theories to recover for that same injury. Rather, the case at that point becomes moot. *See Lewis*, 494 U.S. at 477.

When the alternative theories are *statutory* and *constitutional*, respectively, constitutional avoidance principles bolster the conclusion. Where a court determines that a statutory claim "would provide the relief sought," avoidance doctrine instructs that the court "need not decide" the constitutional issue. *Ricci v. DeStefano*, 557 U.S. 557, 576, 593 (2009) (considering Title VII claim before equal protection claim for this reason); *see also Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984) (remanding for resolution of statutory claim, as it "would moot the constitutional issues"). Indeed, a constitutional decision is "inappropriate" if it would not entitle a party "to relief beyond that to which they were entitled on their statutory claims." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988).

That is because, in such a case, there is no "*need*" to resolve constitutional questions. *Thompson v. Greene*, 427 F.3d 263, 267 (4th Cir. 2005) (emphasis added) (concluding that court "need not reach" constitutional question given relief on rule-based grounds); *see also, e.g.*, *Veasey v. Abbott*, 830 F.3d 216, 265 (5th Cir. 2016) (affirming statutory violation and not reaching constitutional claims, as "Plaintiffs will be entitled to the same relief … if they prevailed"); *Stockton E. Water Dist. v. United States*, 583 F.3d 1344, 1368 (Fed. Cir. 2009) (appropriate to consider contract claim before constitutional claim on avoidance principles, because plaintiffs could "obtain only one recovery for a single harm"). That lack of necessity spells mootness where a court has *already* awarded full relief on the statutory claim.

II. Applying those principles here, Hammons' appeal must be dismissed, because he has no standing to appeal the dismissal of his constitutional claims after securing full relief on his statutory claim premised on the same injury.

Hammons alleged and proved a single, indivisible injury (cancellation of his surgery), causing one category of compensatory harm (lost earnings). That injury, and those money damages, were Hammons' exclusive basis for Article III standing. *See* D. Ct. Dkt. 47 at 7-8 (citing "financial harm" from cancelled surgery, which is "redressable through an award of monetary damages"); D. Ct. Dkt. 52 at 12-16 (court accepting that "the alleged cancellation of Plaintiff's surgery constituted injury," and that "a judgment awarding money damages" would "redress" it).

The district court granted Hammons a final judgment vindicating that injury and awarding those damages, thereby fully redressing his only injury-in-fact. Those money damages constitute "the relief [he] sought" in this case. *Williams*, 716 F.3d at 809. The constitutional claims he seeks to appeal are thus academic. This Court cannot grant Hammons any effectual relief on those claims: "Win or lose, [he] ha[s] already received the 'precise relief' [he] sought." *Eden*, 36 F.4th at 170. All that remains is a mere disagreement about the Constitution, but that is not a "concrete" "personal stake" sufficient for jurisdiction. *Lewis*, 494 U.S. at 477-79. If it were, the constitutional avoidance doctrine would be eviscerated, as there would always be a "need" to answer the constitutional question. *Thompson*, 427 F.3d at 267.

Notably, as the district court observed, Hammons did "not seek prospective relief." D. Ct. Dkt. 52 at 16; *see also* D. Ct. Dkt. 47 at 13 (clarifying in opposition to motion to dismiss that "Mr. Hammons is not seeking injunctive relief '[f]orcing St. Joseph to abandon its Catholic legacy'"). Nor could Hammons have done so, because he plainly lacks standing for any prospective equitable relief after obtaining a hysterectomy at another hospital. *See City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1100 (S.D. Cal. 2017) (plaintiff "lacks standing to seek declaratory or injunctive relief under section 1557 of the ACA" because she "is unable to demonstrate a likelihood of facing future similar harm"). Prevailing on the constitutional claims on appeal would thus not entitle Hammons to any declaratory or prospective relief, because that relief would not redress any cognizable Article III injury. Hammons therefore cannot invoke that prospect to create appellate standing after having received the sole relief (money damages) that he sought.

III. Finally, Defendants respectfully request that the Court adjudicate this motion at the threshold, so that the parties and the Court are not forced to devote resources to briefing, arguing, and considering the merits of a complex appeal, and potentially a conditional cross-appeal, that are destined to be dismissed for lack of jurisdiction. The jurisdictional issue is simple and distinct from the merits; as a prudential matter, it clearly would be preferable to resolve it now.

CONCLUSION

The Court should summarily dismiss this appeal for lack of jurisdiction—and it should do so now, before the parties engage in full merits briefing.

April 14, 2023

Respectfully submitted,

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/s/ Yaakov M. Roth
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Counsel for Appellees

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2) because it contains 2,319 words. This motion complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)–(6) because it was prepared in a proportionally spaced typeface using 14-point Times New Roman font.

/s/ Yaakov M. Roth
Yaakov M. Roth

Counsel for Appellees

EXHIBIT A

From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Wednesday, March 22, 2023 2:06 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Hi Yaakov – thanks for letting me know about the delivery. I confirmed, and we did indeed receive it.

Best,
Abby

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Tuesday, March 21, 2023 10:21 AM
To: Marion, Abigail (x2904) <amarion@pbwt.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

Abby, the check was supposedly delivered to your firm address this morning. When you're able to confirm receipt, that would be great.

Thanks,
Yaakov

Yaakov Roth (bio)
Partner
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yroth@jonesday.com

From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Wednesday, March 15, 2023 8:15 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Yaakov – I'm attaching Mr. Hammons's W9 here.

Thanks,
Abby

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Monday, March 13, 2023 4:51 PM
To: Marion, Abigail (x2904) <amarion@pbwt.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

The instructions look good, but are you able to provide a W9? I know we often have to provide that form to our vendors and such.

Yaakov Roth (bio)
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From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Monday, March 13, 2023 2:21 PM

To: Roth, Yaakov M. <yroth@JonesDay.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Hi Yaakov – please have the funds sent to our firm's account. Further instructions are attached.

Thanks very much,
Abby

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Monday, March 13, 2023 12:28 PM
To: Marion, Abigail (x2904) <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

Abby, now that the court has entered final judgment, can you please provide the payment directions and W9 info requested below?

Thanks very much,
Yaakov

Yaakov Roth (bio)
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From: Roth, Yaakov M.
Sent: Tuesday, January 31, 2023 3:16 PM
To: 'Marion, Abigail (x2904)' <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Thanks Abby. Those changes look fine. We can get the stip on file, probably tomorrow (updating the date).

For purposes of paying the judgment once it gets entered, can you let us know where to direct the funds and provide a W9 and contact info for the proper contact person?

Thanks,
Yaakov

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From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Tuesday, January 31, 2023 11:19 AM

To: Roth, Yaakov M. <yroth@JonesDay.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Yaakov –

Thanks for getting back to us on the motion to defer attorney fee deadlines. I'm attaching our edits to the stipulation on damages. Maryland provides for 6% interest, which we've included here.

Thanks again,
Abby

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Wednesday, January 25, 2023 9:14 AM
To: Marion, Abigail (x2904) <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

This should be fine, Abby. We can finalize the dates and docket cites etc once the court enters the final judgment.

Sent with BlackBerry Work
(www.blackberry.com)

From: Marion, Abigail (x2904) <amarion@pbwt.com>
Date: Tuesday, Jan 24, 2023 at 5:48 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>, Cohen, Andrew (x2605) <acohen@pbwt.com>, Fischer, Aron (x2363) <afischer@pbwt.com>, dmach@aclu.org <dmach@aclu.org>, Knobler, Jonah (x2134) <jknobler@pbwt.com>, Hermann, Jonathan (x2361) <jhermann@pbwt.com>, ~jblock@aclu.org <jblock@aclu.org>, LCOOPER@aclu.org <LCOOPER@aclu.org>, lebert@rosenbergmartin.com <lebert@rosenbergmartin
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>, Paul Werner <PWerner@sheppardmullin.com>, Danielle Vrabie <DVrabie@sheppardmullin.com>, Hannah Wigger <HWigger@sheppardmullin.com>, Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Thanks Yaakov. We will review the stipulation. For our part, here is a draft consent motion pushing the deadlines on our attorney fee motion.

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Tuesday, January 24, 2023 5:00 PM
To: Marion, Abigail (x2904) <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

Abby, attached is a proposed stipulation on damages for your review.

Thanks,
Yaakov

Yaakov Roth (bio)
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From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Thursday, January 19, 2023 10:53 AM
To: Roth, Yaakov M. <yroth@JonesDay.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Yaakov,

Thanks for agreeing to draft the stipulation on damages. Since there is no disagreement about deferring the fee issue until after any appeal, could you also please draft a consent motion extending briefing deadlines on a fee motion until 30 days from the issuance of the mandate?

Thanks again,
Abby

From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Wednesday, January 18, 2023 5:29 PM
To: Marion, Abigail (x2904) <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

Thanks, Abby. We will put together a stipulation as to damages for your review, and it sounds like we're in agreement in terms of what the district court should do next. With respect to the fee motion, we've seen it done both ways but have no objection to proceeding as you suggest.

Thanks,
Yaakov

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From: Marion, Abigail (x2904) <amarion@pbwt.com>
Sent: Wednesday, January 18, 2023 1:35 PM
To: Roth, Yaakov M. <yroth@JonesDay.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: RE: Hammons v. UMMS, No. 20-cv-2088

** External mail **

Yaakov,

Thanks for your message. Since defendants will not contest the $748.46 in damages, we agree that it makes sense for the court to enter final judgment. Please draft a stipulation setting out that there is no disagreement on damages.

As to attorney fees, we do intend to file a motion to recoup reasonable fees. But we think that it would make sense to defer any motion on fees until after the resolution of any appeal. Do you agree?

Thank you,
Abby

Abigail E. Marion
She | Her | Hers
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From: Roth, Yaakov M. <yroth@JonesDay.com>
Sent: Wednesday, January 18, 2023 10:03 AM
To: Marion, Abigail (x2904) <amarion@pbwt.com>; Cohen, Andrew (x2605) <acohen@pbwt.com>; Fischer, Aron (x2363) <afischer@pbwt.com>; dmach@aclu.org; Knobler, Jonah (x2134) <jknobler@pbwt.com>; Hermann, Jonathan (x2361) <jhermann@pbwt.com>; ~jblock@aclu.org <jblock@aclu.org>; LCOOPER@aclu.org; lebert@rosenbergmartin.com
Cc: Denise Giraudo <dgiraudo@sheppardmullin.com>; Paul Werner <PWerner@sheppardmullin.com>; Danielle Vrabie <DVrabie@sheppardmullin.com>; Hannah Wigger <HWigger@sheppardmullin.com>; Imad Matini <IMatini@sheppardmullin.com>
Subject: Hammons v. UMMS, No. 20-cv-2088

Caution: External Email!

Dear Counsel,

In light of the court's summary judgment order and next week's status conference, we wanted to reach out to discuss next steps. Defendants do not intend to contest the damages figure that Plaintiff identified during discovery, so we don't see any reason why the court shouldn't simply proceed to enter final judgment accordingly. Do you agree?

We also assume that, as the prevailing party, Plaintiff will file a motion to recoup reasonable attorneys' fees incurred in litigating this case. Do you want to discuss a briefing schedule for that so we can jointly propose one to the court?

Thanks,
Yaakov

Yaakov Roth (bio)
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EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JESSE HAMMONS	:	
v.	:	Civil Action No. DKC 20-2088
UNIVERSITY OF MARYLAND MEDICAL SYSTEM CORPORATION, et al.	:	

MEMORANDUM OPINION

Plaintiff Jesse Hammons, a transgender man, sought to undergo a hysterectomy as part of his treatment for gender dysphoria. Either he or his surgeon[1] elected to schedule the surgery at the University of Maryland St. Joseph Medical Center ("UMSJ," or the "Hospital"). UMSJ adheres to Catholic religious doctrine. Despite initially authorizing the scheduling of the procedure, the Hospital ultimately refused to authorize the procedure. Under Catholic doctrine, the Hospital barred surgeries that resulted in sterilization, such as a hysterectomy, except when their "direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." Plaintiff asserts that his treating physicians determined that his surgery

[1] Paragraph 2 of the Complaint alleges that Mr. Hammons's [unnamed] surgeon scheduled the procedure. But, ¶ 53 alleges that "Mr. Hammons scheduled a hysterectomy . . . ." Thus, even though Defendants put heavy emphasis on the surgeon as the "but for" cause of Plaintiff's injury in their motion and reply, it is not even clear whether the surgeon selected the hospital or simply scheduled the operation at the behest of Plaintiff.

was medically necessary under the relevant professional standards of care. The Hospital ultimately cancelled the surgery – declaring gender dysphoria was not a "sufficient medical reason" to justify surgery in light of its sterilizing effects. As a result, about six months later, plaintiff underwent a hysterectomy at a different hospital.

Based on the Hospital's unwillingness to permit the hysterectomy, Mr. Hammons has filed suit against Defendants University of Maryland Medical System Corporation ("UMMS") as well as UMSJ Health System, LLC ("UMSJ LLC") and University of Maryland St. Joseph Medical Center, LLC ("St. Joseph LLC," originally organized as "Northeastern Maryland Regional Health System, LLC") (collectively "Hospital LLCs"). St. Joseph LLC is a wholly owned subsidiary of UMSJ LLC, which itself is a wholly owned subsidiary of UMMS. According to plaintiff, the State of Maryland continues to exercise authority and control over UMMS. (ECF 1, ¶ 20).

Plaintiff has brought a three-count complaint alleging that, because UMMS is an arm of the state, Defendants impermissibly have endorsed and entangled themselves with the Catholic religion and discriminated on the basis of sex. He alleges that they violated: the Establishment Clause of the First Amendment (Count I), the Equal Protection Clause of the Fourteenth Amendment (Count II), and § 1557 of the Affordable Care Act ("ACA"), 42 U.S.C § 18116(a), as discrimination on the basis of sex. (Count III). (ECF No. 1).

He alleges that Defendants treated Mr. Hammons—as a man who is transgender—differently from non-transgender patients who require medically necessary hysterectomies for other medical conditions. Presently pending is a motion to dismiss that complaint. (ECF No. 39). The issues have been briefed, and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, the motion to dismiss will be granted in part and denied in part.

I. Background

The following facts are outlined in the complaint, including references to information in the public domain. St. Joseph Hospital was founded over a hundred years ago by the Sisters of St. Francis of Philadelphia and operated as a private Catholic hospital for most of its history. More recently, it was run by Catholic Health Initiatives, which Plaintiff describes as a "consortium" of three Catholic health care systems and ten congregations. In 2012, the Hospital was in dire financial straits and decided to put the facility up for sale. University of Maryland Medical Center ("UMMS") expressed interest but a "sticking point" in the negotiations was whether the Hospital would continue to be run as a "Catholic institution." The Hospital, prior to the sale, had operated according to the Catholic Directives ("the Directives"), a series of ethical directives created and published by the U.S. Conference of Catholic Bishops

and aimed at Catholics administering health care; the Catholic Church forbade the sale without approval of the Archdiocese of Baltimore and the Vatican, both of which were adamant that the center continue to adhere to these tenets even after it divested itself from any direct control or ownership of the Hospital. In fact, Cardinal O'Brien publicly declared that the local Church would "do everything possible in the months and years ahead" to keep the Hospital operating as a Catholic center. UMMS ultimately entered into a written agreement with the Catholic Church that the Hospital would continue to operate under the Directives. Ultimately, UMMS purchased the Hospital for over $200 million.

Plaintiff asserts that UMMS and its subsidiaries continue to abide by the Directives, and they link directly to them on their webpage "About UM SJMC [University of Maryland St. Joseph Medical Center]," wherein UMMS holds this center out as a "Catholic acute care hospital that observes the Ethical and Religious Directives for Catholic Health Care Services." (ECF No. 1, at 2 n.1) (quoting http://www.umms.org/sjmc/about (last accessed July 16, 2020)). The Directives include a number of core principals, including that healthcare must "respect the sacredness of every human life from the moment of conception until death." What this meant in practice is that the Directives prohibited a number of practices such as "contraceptive interventions" that "have the purpose, whether as an end or a means, to render procreation impossible." In a similar

vein and at issue here, the Directives also declare that "[d]irect sterilization of either men or women, whether permanent or temporary, is not permitted."

Critically, the Directives contain an exception: "Procedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." The complaint also highlights a later portion of the Directives, asserting, "The stated basis for this rule is the Catholic teaching that Catholic health care organizations are not permitted to engage in 'immediate material cooperation in actions that are intrinsically immoral, such as abortion, euthanasia, assisted suicide, and direct sterilization.'" (ECF No. 1, ¶ 3) (quoting the Directives at 19, ¶ 53 and 25, ¶ 70, which are available at http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf (last accessed July 16, 2020)).

As a transgender man, Mr. Hammons sought to have a hysterectomy "as a medically necessary treatment of gender dysphoria."[2] A hysterectomy, the complaint explains, is "surgery

[2] Plaintiff explains that this is "the diagnostic term for the clinically significant emotional distress experienced as a result of the incongruence of one's gender with their assigned sex and the physiological developments associated with that sex. Gender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual of Mental Disorders ('DSM-V') and International Classification of Diseases ('ICD-10'). The

to remove a patient's uterus" and is a sterilizing procedure: after undergoing a hysterectomy, a patient can no longer become pregnant. "Transgender men often require a hysterectomy as a gender-affirming surgical treatment for gender dysphoria." Plaintiff argues that he met all the criteria under the "accepted standards of care for treating dysphoria" published by the World Professional Association for Transgender Health to receive a hysterectomy,[3] and his physicians recommended he receive one.

Plaintiff scheduled the surgery at UMSJ to take place on January 6, 2020. To prepare for it he "underwent pre-operative blood tests, an echocardiogram, and other health screenings with his treating physician" and arranged for the operation to take place "during a break from school" and he arranged to "to take off time from work."[4] As the complaint explains, however:

> Approximately 7–10 days before Mr. Hammons's surgery was scheduled to take place, University of Maryland St. Joseph Medical

---

criteria for diagnosing gender dysphoria are set forth in the DSM-V (302.85)." (ECF No. 1, at 15). Plaintiff treats the "medically necessary" designation as presumptively and implicitly satisfying the lone exception to the Directives' general ban on sterilizing operations – one that had "the direct effect" of curing or alleviating "a present and serious pathology," for which a simpler treatment was "not available."

[3] These included, among other thing, documentation of "[p]ersistent" gender dysphoria, twelve months of "continuous" hormone therapy, and two referral letters from "qualified mental health professionals." (See ECF No. 1, ¶ 52 n.26).

[4] It is not clear from the complaint if Mr. Hammons' work is school (i.e. he is a teacher), or he was both working and going to school part-time.

> Center's Senior Vice President for Medical Affairs and Chief Medical Officer, Gail Cunningham, ordered the surgery canceled. Dr. Cunningham told Mr. Hammons's surgeon that he could not perform Mr. Hammons's hysterectomy because the surgery conflicted with the hospital's Catholic religious beliefs and the Catholic Directives.

(ECF No. 1, ¶ 56). Plaintiff alleges that Dr. Cunningham told his surgeon that "according to University of Maryland St. Joseph Medical Center's religious beliefs, Mr. Hammons's gender dysphoria did not qualify as a sufficient medical reason to authorize the procedure." Dr. Cunningham also explained that "performing the hysterectomy and removing an otherwise healthy organ would violate the Catholic Directives' command to preserve the 'functional integrity'" of the human body. While this purported reasoning was therefore facially neutral as to Plaintiff's gender identity, Mr. Hammons argues the Directives themselves state, "[t]he functional integrity may be sacrificed to maintain the health or life of the person where no other morally permissible means is available." (*Id.*, ¶ 58) (quoting the Catholic Directives, at 14, ¶ 29). Following such a directive, Plaintiff asserts that surgeons at UMSJ have removed "otherwise healthy tissue to prevent cancer or other diseases." Nonetheless, Dr. Cunningham informed Mr. Hammons that UMSJ "did not consider Mr. Hammons's gender dysphoria to be a valid basis under the Catholic Directives to justify disrupting the body's 'functional integrity.'"

When he found out about the cancellation of his surgery only days before it was to take place, Mr. Hammons "felt shocked, angry, afraid, and devastated." Mr. Hammons "was not able to have his hysterectomy performed until June 24, 2020."[5] Moreover, because of the forced rescheduling:

> Mr. Hammons had to spend more money on an additional round of pre-operative tests; he had to spend another six months experiencing gender dysphoria without the therapeutic benefits of the surgery; and he had to spend another six months carrying the stress and anxiety of having to mentally prepare himself for the surgery all over again.

(*Id.*, ¶ 60).

The complaint asserts Establishment Clause and Equal Protection claims under § 1983 and a claim under the ACA, requesting: A) declaratory relief that Defendants violated Plaintiff's rights under all three laws, B) compensatory damages "in an amount to be determined at trial," C) nominal damages, D) "reasonable" costs and attorneys' fees under 42 U.S.C. § 1988, and E) "[s]uch other relief as the Court deems just and proper." (*Id.*, ¶¶ 61-93 and A-E).

---

[5] Defendants characterize this gap between the originally scheduled surgery and the re-scheduled surgery as evidence that "Mr. Hammons voluntarily delayed" seeking treatment elsewhere after his operation was cancelled at UMSJ. (ECF No. 39-1, at 14 & n. 15). As Plaintiff correctly asserts in opposition, however, such a claim goes beyond the complaint and does not cast the facts in the light most favorable to Plaintiff, which is the proper perspective at this stage of the proceeding. (ECF No. 47, at 18 n.4).

On September 25, 2020, Defendants moved to dismiss. (ECF No. 39). They argue that 1) Plaintiff lacks standing to bring suit, 2) Plaintiff cannot sue Defendants for § 1983 violations as they are private corporations or, if they are found to be state actors, those claims are barred by sovereign immunity, 3) Plaintiff otherwise fails to plead a valid Establishment Clause violation or 4) Equal Protection Claim, and 5) Plaintiff's ACA claim fails as a matter of law. (*See* ECF No. 39-1, at 2). On November 23, 2020, Plaintiff responded in opposition (ECF No. 47), and on December 21, 2020, Defendants replied. (ECF No. 48).

II. Standing

Defendants first contend that that Plaintiff lacks standing to bring this suit. It is a bedrock principle that Article III of the Federal Constitution confines the federal courts to the adjudication of "actual, ongoing cases or controversies." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (citations omitted); *see also Carney v. Adams*, 141 S. Ct. 493, 498 (2020); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013); *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252 (4th Cir. 2020). "Indeed, 'no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Dreher v. Experian Info. Solutions, Inc.*, 856 F.3d 337, 343 (4th

Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

"Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'" *Uzuegbunam v. Preczewski,* 141 S. Ct. 792, 798 (2021) (citations omitted). Therefore, during the pendency of a case, an actual controversy must exist. *See Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974); *Int'l Bhd. of Teamsters, Local Union No. 639 v. Airgas, Inc.*, 885 F.3d 230, 234 (4th Cir. 2019); *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013). In the absence of a case or controversy, "the court's subject matter jurisdiction ceases to exist . . . ." *S.C. Coastal Conservation League v. U.S. Army Corps. of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015).

In turn, Constitutional standing doctrine stems from the case or controversy requirement. *See, e.g., Trump v. New York*, 141 S. Ct. 530, 535 (2020); *Spokeo, Inc.*, 136 S. Ct. at 1547. The *Clapper* Court explained, "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." 568 U.S. at 408:

As explained in *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992), a plaintiff must satisfy three elements to establish Article III standing:

> First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

(internal quotation marks and citations omitted).

"For an injury to be traceable, 'there must be a causal connection between the injury and the conduct complained of' by the plaintiff." *Air Evac EMS, Inc. v. Cheatham*, 910 F.3d 751, 760 (4th Cir. 2018) (quoting *Lujan*, 504 U.S. at 560). However, "the defendant's conduct need not be the last link in the causal chain[.]" *Id.*; *see also Lexmark Int'l, Inc.*, 572 U.S. 118, 134 n.6 (2014) ("Proximate causation is not a requirement of Article III standing[.]"). "[W]here the plaintiff suffers an injury that is 'produced by [the] determinative or coercive effect' of the defendant's conduct 'upon the action of someone else,'" the traceability requirement is satisfied. *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand and Lansdowne, LLC*, 713 F.3d

187, 197 (4th Cir. 2013) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)).

Defendants do not dispute that the alleged cancellation of Plaintiff's surgery constituted injury for purposes of standing. But they contend that the injury was neither traceable to nor redressable by them.

Defendants posit that Plaintiff's surgeon caused injury to Plaintiff, not the Hospital, because the surgeon arranged for the surgery to take place at UMSJ, with knowledge that the hysterectomy was impermissible under the Directives. (*See* ECF 39-1 at 10, 16-17). According to Defendants, the surgeon knew the hysterectomy was impermissible because he "voluntar[ily] agreed to comply with the ERDs [ethical and religious directives] when accepting admitting privileges at St. Joseph." Thus, they argue that Plaintiff's injuries "stem directly from his surgeon's mis-scheduling a procedure that he knew could not be performed at St. Joseph." (*Id.* at 17).

This argument fails for at least two reasons. First, the facts, seen in the light most favorable to Plaintiff, do not establish that the surgeon had actual knowledge the surgery would be prohibited by the Hospital under the Directives. Second, the argument misapplies the traceability requirement.

As to the surgeon's knowledge of the purported harm, according to the Complaint, "adherence" to the Directives is a "condition

for medical privileges and employment at the Hospital." (ECF 1, ¶ 28) (quoting the Directives at 9). Thus, it is reasonable to infer that the surgeon knew that he was required to comply with the Directives. But that does not amount to knowledge that Plaintiff's scheduled hysterectomy was — or would be found to be — contrary to the Directives. It would have been far from obvious to the surgeon or anyone reading the Directives' that the prohibition on sterilization and "command to preserve the 'functional integrity' of the human body" would necessarily bar Plaintiff's surgery. The complaint asserts that Plaintiff had satisfied the relevant standards of care to deem his operation medically necessary. Given this designation and the subsequent approval of the surgery by Plaintiff's "treating physicians," even if the surgeon knew the Directives generally barred hysterectomies, the surgeon would have every reason to believe that this particular hysterectomy fit within the Directives' sole exception to the prohibition on sterilization.

Defendants' argument around traceability also misses the mark. Traceability requires only that Plaintiff's injury be "'fairly traceable'" to Defendants' conduct; Defendants need not be "'the sole or even immediate cause'" of that injury. *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 212 (4th Cir. 2020) (citation omitted); *see Libertarian Party of Virginia v. Judd*, 718 F.3d 308, 316 (4th Cir. 2013) (reasoning that if the defendant was "at least

in part responsible" for the plaintiff's injury, then traceability was satisfied).

Here, Plaintiff was to undergo a procedure at St. Joseph that, according to Plaintiff, was medically necessary. It is undisputed that the cancellation of that surgery constituted an injury in fact. Moreover, the Hospital's Chief Medical Officer "ordered the surgery canceled." (ECF 1, ¶ 56). Defendants do not contend that the conduct of the Chief Medical Officer is not attributable to them. Thus, the cancellation of the surgery was caused, "at least in part," by Defendants' reliance on the Directives and application of the Directives in this particular case. *Judd*, 718 F.3d at 316. Nothing more is required.

Defendants' citation to *Lane v. Holder*, 703 F.3d 668 (4th Cir. 2012) and *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26 (1976), is also misplaced. Defendants rely on both cases for the proposition that a third-party's conduct can break the causal chain between a plaintiff and defendant(s) where the injuries can be seen to flow from that conduct. (ECF 39-1, at 17). In Defendants' view, the conduct of Plaintiff's surgeon caused Plaintiff injury and broke the "'traceability' chain." (*Id.*). Plaintiff counters that this argument makes no sense, as the surgeon's conduct preceded the cancellation of the surgery, and, even if the chain was somehow severed by the surgeon's conduct, Defendants "picked the chain back up" as the "*final actors*" in the chain of events

leading to the cancellation of the surgery. (ECF No. 47, at 17). In reply, Defendants ignore this central, temporal flaw in their argument and instead refute Plaintiff's argument (in the alternative) that they could have "picked the [causal] chain back up"; they argue this cannot be as the complaint establishes that "Hammons' surgeon's conduct is *the but for cause* of St. Joseph's cancellation." (ECF No. 48, at 11).

Plaintiff is correct that the caselaw only focuses on *intervening* conduct of a third-party, and so these cited decisions have no bearing here. The last act in the causal chain was the Chief Medical Officer's cancellation of the hysterectomy, in reliance on the Directives and the Hospital's avowed religious beliefs. The decision to schedule the surgery at St. Joseph set the causal chain in motion; it could not have both initiated it and broken it, as asserted it by Defendants. Of course, as Defendants argue, that decision was *a* but-for cause of the injury, but an event can have multiple but-for causes. *See, e.g.*, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1739, (2020) ("Often, events have multiple but-for causes."); *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 217 (4th Cir. 2016) (stating that "a cause need not work in isolation to be a but-for cause"). Here, the scheduling of the hysterectomy and the cancellation of it were *both* but-for causes of the harm to plaintiff.

Having determined that traceability is satisfied, redressability, is easily met here. Plaintiff seeks damages based on a past injury; he does not seek prospective relief. Recently, the Supreme Court concluded "that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right." *Uzuegbunam*, 141 S. Ct. at 802. For standing purposes, a judgment awarding money damages is considered sufficient to redress past harms. *See id.*; *Wernsing v. Thompson*, 423 F.3d 732, 745 (7th Cir. 2005) (stating that "injuries compensable in monetary damages can always be redressed by a court judgment").

Therefore, Plaintiff has standing to bring this suit.

III. Standards of Review-Motion to Dismiss

Defendants' arguments that Plaintiff has failed to allege the necessary elements of his § 1983 or ACA claims are analyzed under Fed.R.Civ.P. 12(b)(6), while the assertion that sovereign immunity constitutes a bar to the two Constitutional claims properly is assessed under Fed.R.Civ.P. 12(b)(1).[6]

A. Fed.R.Civ.P. 12(b)(6)

A motion to dismiss under Fed.R.Civ.P. 12(b)(6) tests the sufficiency of the complaint. *Presley v. City of Charlottesville*,

[6] Defendants only discuss Fed.R.Civ.P. 12(b)(1) in the context of their standing argument, and neither party identifies what standard applies to the sovereign immunity defense. There has been a historical lack of clarity from the Fourth Circuit on whether the existence of sovereign immunity is grounds for

464 F.3d 480, 483 (4th Cir. 2006). "[T]he district court must accept as true all well-pleaded allegations and draw all reasonable factual inferences in plaintiff's favor." *Mays v. Sprinkle*, No. 19-1964, 2021 WL 1181273, at *2 (4th Cir. Oct. 27, 2020) (reversing a district court's dismissal of a complaint because "we must accept the well-pleaded facts and draw reasonable inferences in favor of the plaintiff"). In evaluating the complaint, unsupported legal allegations need not be accepted. *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 873 (4th Cir. 1989). Legal conclusions couched as factual allegations are insufficient, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), as are conclusory factual allegations devoid of any reference to actual events. *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844, 847 (4th Cir. 1979); *see also Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)). Thus, "[d]etermining whether a complaint states a plausible claim for

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dismissal under Fed.R.Civ.P. 12(b)(6), for a failure to state a claim, or under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction. This court has said, "Judges in this district favor analysis under Fed.R.Civ.P. 12(b)(1) as the defense "functions as a block on the exercise of that jurisdiction." *See Borkowski v. Balt. Cty., Md.*, 414 F.Supp.3d 788, 804 (D.Md. 2019) (quoting *Gross v. Morgan State Univ.*, 308 F.Supp.3d 861, 865 (D.Md. 2018)) (internal quotation marks omitted).

relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

B. Fed.R.Civ.P. 12(b)(1)

A motion to dismiss under Rule 12(b)(1) should be granted "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). In the context of such a motion, courts should "regard the pleadings as mere evidence on the issue," and "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). As a general rule, the plaintiff bears the burden of proving that subject matter jurisdiction exists. *Richmond* 945 F.2d at 768-69.

The Fourth Circuit has recently clarified that the defense of sovereign immunity is a jurisdictional bar, explaining that "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018) (citation omitted) (discussing sovereign immunity in the context of government contractors), *cert. denied*, 139 S. Ct. 417 (2018) (quoting *Ackerson*

v. Bean Dredging LLC, 589 F.3d 196, 207 (5th Cir. 2009); *see also Cunningham v. Lester*, 990 F.3d 361,365 (4th Cir. 2021) (recognizing sovereign immunity as a jurisdictional limitation and describing it as "a weighty principle, foundational to our constitutional system"). In this context, however, "the burden of proof falls to an entity seeking immunity as an arm of the state, even though a plaintiff generally bears the burden to prove subject matter jurisdiction." *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019) (citing *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014)).

IV. Counts I and II: Failure to State a Claim or a Jurisdictional Bar to Suit

Defendants argue that Plaintiff's "central claims" (his § 1983 claims under Count I and Count II) "are premised on a fatal paradox." Plaintiff asserts that Defendants are part of the state's "Medical System," and thus are a state actor within the ambit of § 1983. At the same time, the complaint alleges that they are private corporations and thus not entitled to sovereign immunity as a defense. Defendants, in turn, argue that Plaintiff "cannot have it both ways": Mr. Hammons either fails to state a claim under these counts pursuant to Fed.R.Civ.P. 12(b)(6), or these counts are barred by sovereign immunity as a jurisdictional matter under Fed.R.Civ.P. 12(b)(1). (ECF 39-1, at 15, 19) (citing ECF No. 1, ¶¶ 35, 62-64, and 70-72). Defendants are correct and Counts I and II must be dismissed, but it must be decided whether

the dismissal is because they are not governmental actors and thus the dismissal is with prejudice under Rule 12(b)(6), or because they are entitled to sovereign immunity (and not persons) and thus the dismissal is without prejudice under Rule 12(b)(1).

A. State Action under § 1983

Count I, alleging a violation of the Establishment Clause of the of the First Amendment (as incorporated by the Fourteenth Amendment against the States), and Count II, alleging a violation of the Equal Protection Clause of the Fourteenth Amendment, are both asserted pursuant to 42 U.S.C. § 1983. (ECF 1. ¶¶ 63, 68, 71, 84). Under § 1983, a plaintiff may file suit against any person who, acting under color of state law, "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States. *See, e.g.*, *Filarsky v. Delia*, 566 U.S. 377 (2012); *see also Owens v. Balt. City State's Att'ys Off.*, 767 F.3d 379 (4th Cir. 2014), *cert. denied sub nom. Balt. City Police Dep't v. Owens*, 575 U.S. 983 (2015).

To state a claim under § 1983, a plaintiff must allege (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a "person acting under the color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988); *see Davison v. Randall*, 912

F.3d 666, 679 (4th Cir. 2019); *Crosby v. City of Gastonia*, 635 F.3d 634, 639 (4th Cir. 2011), *cert. denied*, 565 U.S. 823 (2011); *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 615 (4th Cir. 2009); *Jenkins v. Medford*, 119 F.3d 1156, 1159-60 (4th Cir. 1997). A person acts under color of state law "only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Polk County v. Dodson*, 454 U.S. 312, 317-18 (1981) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)); *see also Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 181 (4th Cir. 2009) ("[P]rivate activity will generally not be deemed state action unless the state has so dominated such activity as to convert it to state action: Mere approval of or acquiescence in the initiatives of a private party is insufficient.") (citations and internal quotation marks omitted).[7]

Defendants maintain that this suit targets "'merely private conduct'" rather than state action or action taken under color of state law. (ECF 39-1, at 19) (quoting *Philips*, 572 F.3d at 181). As observed by Plaintiff, however, Defendants "generally do not differentiate between" UMMS and the Hospital LLCs. (ECF 47, at 21 n.6). Rather, Defendants stake their state action defense on the

[7] The § 1983 "under color of state law" element "'is synonymous with the more familiar state-action requirement' for Fourteenth Amendment claims, 'and the analysis for each is identical.'" *Davison*, 912 F.3d at 679 (quoting *Philips* 572 F.3d at 180).

character of UMMS alone. Plaintiff's complaint alleges that UMMS not only owns the Hospital LLCs as subsidiaries but is also "pervasively entwined with the[ir] management and governance." (*Id.* ¶¶ 10,11, 37). In light of the position adopted by the parties and the common ownership of the Hospital LLCs, Defendants will be treated as a single entity for purposes of this motion.

Defendants underscore that UMMS is designated by Md. Code Educ. § 13-303(m) as a "private, nonprofit, nonstock corporation . . . independent from any State agency." (*See* ECF 39-1, at 19). And, in their view, the standard for assessing whether the cancellation of Plaintiff's surgery constituted state action is taken from *Moore v. Williamsburg Reg'l Hosp.*, 560 F.3d 166 (4th Cir. 2009), which discusses the so-called "close nexus" test. (ECF 39-1, at 20). In *Moore*, the Fourth Circuit articulated that test as follows:

> [A] private entity's action can constitute state action if "'there is a sufficiently close nexus between the State and the challenged action of the regulated entity that the action of the latter may fairly be treated as that of the State itself,'" . . . . The state is deemed responsible for the private entity's action "if the private party acts (1) in an exclusively state capacity, (2) for the state's direct benefit, or (3) at the state's specific behest."

560 F.3d at 179 (citations omitted).

Plaintiff's rejoinder to Defendants' state action defense depends on *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374

(1995), dealing with a government created and controlled corporation. In both his complaint and opposition, he asserts that *Lebron* compels the conclusion that UMMS is an instrumentality of the State. (*See* ECF Nos. 1, ¶ 24 and 47, at 22-27). *Lebron* teaches that the statutory language calling UMMS "private" and "independent from any State agency" is not dispositive of whether UMMS is part of the State of Maryland. And, he asserts, *Lebron*, not *Moore*, supplies the proper standard for analyzing whether UMMS is part of the State. (*See* ECF No. 47, at 22-24).

In *Lebron*, the plaintiff sought to display a politically controversial advertisement on a billboard owned by the National Railroad Passenger Corporation, "commonly known as Amtrak." 513 U.S. at 376. Amtrak disapproved of the proposed message and did not allow display of the advertisement. The plaintiff filed suit against Amtrak, alleging a violation of his First Amendment rights. Amtrak contended that it was not a state actor. According to Amtrak, the plaintiff's state action theory was foreclosed by the disclaimer of governmental status in Amtrak's authorizing statute. *Id.* at 377, 392.

The Supreme Court considered whether Amtrak's conduct constituted state action and pointed out that the case differed from where a private entity is alleged to have carried out "governmental action," as the plaintiff had alleged Amtrak was "not a private entity but Government itself." Lending credibility

to that assertion, the Court observed that Amtrak was established by act of Congress "in order to avert the threatened extinction of passenger trains in the United States," and to serve "'the *public convenience and necessity*.'" By statute, Amtrak is "'a for profit corporation,'" and "its authorizing statute declares that it 'will not be an agency or establishment of the United States Government.'" But six of Amtrak's nine board members are appointed by the President of the United States. In addition, it is "required to submit three different annual reports to the President and Congress." *Id.* at 383-386, 391 (citations omitted) (emphasis in original). The Court placed the creation of Amtrak amid "the long history of corporations created and participated in by the United States for the achievement of governmental objectives." *Id.*; *see Sprauve v. W. Indian Co.*, 799 F.3d 226, 230 (3d Cir. 2015) (summarizing that discussion).

The Supreme Court ultimately reasoned that the statute that created Amtrak "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control," such as deciding whether to subject Amtrak to statutes like the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and federal procurement laws. *Lebron*, 513 U.S. at 392. Similarly, the Court explained, Congress has the power to deprive Amtrak of sovereign immunity. But, of relevance here, the Court admonished:

> [I]t is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions. If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.

Id.

Recently analyzing *Lebron*, the Fourth Circuit observed that the case focused on two key factors: whether an entity served a governmental purpose and whether it was controlled by the government. *Meridian Invs., Inc. v. Fed. Home Loan Mortg. Corp.*, 855 F.3d 573, 578 (4th Cir. 2017). On the first front, because Amtrak was "'created by a special statute, explicitly for the furtherance of federal governmental goals,' it was clear that Amtrak served a government purpose." *Id.* (quoting *Lebron,* 513 U.S. at 398). As to the second factor, *Lebron* noted that the government "controls the operation of the corporation through its appointees," thus acting "not as a creditor but a policymaker." *Meridian Invs.,* 855 F.3d at 579 (quoting *Lebron,* 513 U.S. at 399); *see Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 55 (2015) ("*Lebron* teaches that . . . the practical reality of federal control and supervision prevails over Congress' disclaimer of Amtrak's governmental status."). It held "that where, as here, the Government [1] creates a corporation by special law, [2] for

the furtherance of governmental objectives, and [3] retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of" individual constitutional rights. *Lebron,* 513 U.S. at 399 (bracketed numbers added); *see Philips*, 572 F.3d at 186 (separating the *Lebron* test into three parts in this fashion).

Defendants assert that the Fourth Circuit has placed "limited reliance" on *Lebron* and cited the case just twice in twenty-five years. (ECF 39-1 at 22, n.18). But, as Plaintiff points out, Defendants cite three decisions of the Fourth Circuit in their motion that discuss *Lebron*: *Philips*, 572 F.3d 176; *Kerpen v. Metro. Washington Airports Auth.*, 907 F.3d 152, 158 (4th Cir. 2018); and *Meridian Invs.*, 855 F.3d 573. Indeed, the Supreme Court recently extended *Lebron*'s holding in *Ass'n of Am. Railroads*, 575 U.S. at 46, concluding that Amtrak is a governmental entity for purposes of separation of powers issues, in addition to individual constitutional rights. And courts in multiple circuits, including the Fourth Circuit, continue to apply *Lebron* when wrestling with questions concerning the governmental status of corporate entities created by the federal government, *see, e.g.*, *Kerpen*, 907 F.3d at 159; *Meridian Invs.*, 855 F.3d at 578-79; *Herron v. Fannie Mae*, 861 F.3d 160, 167-68 (D.C.Cir. 2017), as well corporations created by states. *See, e.g.*, *Sprauve*, 799 F.3d at 231-32; *Philips*, 572 F.3d at 185-86; *Hack v. President & Fellows of Yale Coll.*, 237 F.3d 81,

83 (2d Cir. 2000), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Potomac Construction Company, Inc., v. Washington Metro. Area Transit Auth.*, GLS-21-193, 2021 WL 1516058, at *11 (D.Md. Apr. 16, 2021); *White Coat Waste Project v. Greater Richmond Transit Co.*, 463 F.Supp.3d 661, 688-89 (E.D.Va. 2020); *Pennsylvania Pro. Liab. Joint Underwriting Ass'n v. Wolf*, 324 F.Supp.3d 519, 531 (M.D.Pa. 2018).[8]

Other courts have used *Lebron* in similar circumstances, choosing to apply its three-part test rather than other formulations of state action doctrine. *See, e.g., Sprauve*, 799 F.3d at 230 (relying on *Lebron* given the plaintiff's contention that the defendant "is the government"); *Hack*, 237 F.3d at 83 (noting that "plaintiffs rely almost entirely upon *Lebron*").

[8] Defendants cite *Mentavlos v. Anderson*, 249 F.3d 301, 312 (4th Cir. 2001) for the proposition that "the *Lebron* factors are not 'conclusive' for finding state action against" entities other than Amtrak. (ECF 48 at 13). This is a mischaracterization of *Mentavlos*. There, the Fourth Circuit addressed the status of a military college, not a corporation. *Mentavlos*, 249 F.3d at 305. In the portion of the discussion cited by defendants, the Fourth Circuit identified various circumstances in which "state action has been found . . . ." *Id.* at 312. It cited *Lebron* as one example of a determination of state action, *id.*, but did not otherwise discuss the case, as the facts did not lend themselves to analysis under *Lebron*. The court also cautioned that the presence of the various "circumstances" it identified "might not be conclusive" of the issue of state action. *Id.* Clearly, the *Mentavlos* court was describing the difficult terrain of state action doctrine generally, not the *Lebron* test specifically, as asserted by Defendants. Defendants likewise distort *Philips*, 572 F.3d at 182. They cite it for a proposition that it plainly does not contain. (*See* ECF No. 48, at 13).

In *Puerto Rico Ports Authority v. Federal Maritime Com'n*, 531 F.3d 868, 873 (D.C. Cir. 2008), the court remarked that:

> Determining whether a particular entity is an arm of the State can be a difficult exercise. The cases generally arise in three different factual settings involving: (1) agencies that are either arms of the State or political subdivisions, such as cities or counties, that are not entitled to sovereign immunity; (2) special-purpose public corporations (like PRPA) established by States to perform special functions; these may be either arms of the State or non-governmental corporations not entitled to sovereign immunity; and (3) Compact Clause entities established by two or more States by compact and approved by Congress; these are sometimes considered arms of their constituent States for sovereign immunity purposes, although the Supreme Court has recognized a presumption against sovereign immunity for Compact Clause entities, see *Hess* [*v. Port Authority*], 513 U.S. [30 (1994)] at 42.[2]
>
> [2] None of the Supreme Court's arm-of-the-state cases has considered a special purpose public corporation like PRPA that was created by the State.

As noted by then Judge Kavanaugh in *PRPA*, as of 2008, none of the Supreme Court cases dealt with a state created special purpose corporation, including *Lebron* which was decided in 1995. And the D.C. Circuit used a different test, from *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994). But, as noted above, other lower courts have used the *Lebron* analysis and it appears particularly appropriate to do so for a state created corporation.

The first two elements of the three-part *Lebron* test easily are met here. First, UMMS was created "by special law." *See* Md. Code. Educ. §§ 13-301 to 13-313. Second, UMMS was created "for the furtherance of governmental objectives." In this respect, the

"Legislative findings" set forth in § 13-302 are pertinent. The statute expressly states that the purposes for which UMMS was created include "provid[ing] medical care of the type unique to University medical facilities for the citizens of the State and region," *id.* § 13-302(1), and "extend to all citizens of the State . . . ." *Id.* § 13-302(1). Moreover, the Maryland legislature declared that these purposes "serve the highest public interest and are essential to the public health and welfare." *Id.* § 13-302(4). The plain language of the statute reflects the legislature's intent to advance governmental objectives. *Cf. Sprauve*, 799 F.3d at 233 (indicating that the second *Lebron* prong was satisfied where statute announced that corporation was created for "'public purposes'") (citation omitted).

The third *Lebron* element is also satisfied. This consideration concerns whether the government "retains . . . permanent authority to appoint a majority of the directors" of the corporation. *Lebron,* 513 U.S. at 399. The element reflects the *Lebron*'s concern with governmental control. *See Ass'n of Am. Railroads*, 575 U.S. at 55; *Meridian*, 855 F.3d at 579; *Herron*, 861 F.3d at 168. This test, however, does not require a court to look beyond the composition of a board of directors to ascertain governmental control; as some courts of appeal have put it, "'[w]e think *Lebron* means what it says.'" *Herron*, 861 F.3d at 168 (quoting *Hack*, 237 F.3d at 84). Here, all members of UMMS's

directors are appointed by the Governor of Maryland, with the advice and consent of the State Senate. Md. Code Educ. § 13-304(b). Therefore, the element is readily satisfied. Thus, under *Lebron*, UMMS is a governmental entity, that is, an arm or instrumentality of government for purposes of Plaintiff's assertion of his individual constitutional rights. Thus, the state action requirement of the Fourteenth Amendment and the color of law requirement of 42 U.S.C. § 1983 are satisfied.

Defendants assert, then, that if the Medical System is an arm of Maryland, the § 1983 claims fail because arms of a state are not "persons," citing *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70–71 (1989); Clark *v. Md. Dep't of Public Safety & Corr'l Servs.*, 316 F. App'x 279, 282 (4th Cir. 2009); and *Lawson v. Green*, 2017 WL 3638431, at *4 (D.Md. Aug. 23, 2017). (ECF No. 39-1, at 16.) Defendants also contend that they are entitled to sovereign immunity. Plaintiff counters that the inquiries are congruent, and that only governmental agencies that are considered arms of the State for Eleventh Amendment immunity are not "persons" under § 1983, or on the other hand, an entity that is NOT immune under the Eleventh Amendment is a person subject to suit under § 1983. (ECF No. 47, at 30) (*citing Harter v. Vernon*, 101 F.3d. 334, 338 n. 1 (4th Cir. 1996)). The Fourth Circuit there held that "federal courts should approach these issues solely under the

rubric of the Eleventh Amendment and should not consider an argument of 'personhood' under § 1983."

B. Sovereign Immunity

Defendants contend that if UMMS is part of the State under *Lebron*, then it is an instrumentality of the state entitled to state sovereign immunity for Counts I and II. (ECF 39-1, at 23). Plaintiff counters that UMMS is not an arm of the state for purposes of sovereign immunity, or, in the alternative, that the Maryland legislature waived UMMS's sovereign immunity. (ECF 47, at 27-29). Defendants argue in response that UMMS cannot be the State for purposes of state action and at the same time fail to qualify as an arm of the state for purposes of sovereign immunity. Moreover, they contend that the State did not waive UMMS's immunity. (ECF 39-1, at 19).

The doctrine of state sovereign immunity predates the Eleventh Amendment as a form of immunity the States enjoyed before the ratification of the Constitution and originally encompassed a broader concept. *See Stewart v. North Carolina*, 393 F.3d 484, 487-88 (4th Cir. 2005) (citing, among others, *Alden v. Maine*, 527 U.S. 706, 724 (1999) ("The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principal") and *Hans v. Louisiana*, 134 U.S. 1, 3 (1890)) (explaining that the "Eleventh Amendment immunity is but an example

of state sovereign immunity as it applies to suits filed in federal court against unconsenting states by citizens of other states").

The Eleventh Amendment, in turn, provides that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or subjects of any Foreign State." The Supreme Court has explained: "Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (collecting cases). Thus, "the ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." *Id.* Put simply, States are generally immune from suit for damages in federal court, absent consent or a valid congressional abrogation of sovereign immunity. *See Coleman v. Court of Appeals of Md.*, 566 U.S. 30, 35 (2012); *Va. Office for Prot. & Advocacy*, 563 U.S. at 253-54; *Passaro v. Virginia*, 935 F.3d 243, 247 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 903 (2020). This expansion of the Eleventh Amendment has narrowed the gap between the two concepts considerably and eliminated it entirely in this context.

The parties refer to Eleventh Amendment immunity and state sovereign immunity interchangeably. (*See, e.g.*, ECF 47 at 27-28;

ECF 48 at 14). Consistent with the parties' usage, state sovereign immunity will be treated as synonymous with Eleventh Amendment immunity.

State sovereign immunity bars suit not only against a state, but also against an instrumentality of a state, such as a state agency, often referred to as an "arm of the state." *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."); *see also McCray v. Md. Transit Admin.*, 741 F.3d 480, 483 (4th Cir. 2014); *Bland v. Roberts*, 730 F.3d 368, 389 (4th Cir. 2013); *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 479 (4th Cir. 2005).

In defining its scope, the Fourth Circuit has said sovereign immunity applies when "the governmental entity is so connected to the State that the legal action against the entity would . . . amount to the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *Cash v. Granville Cty. Bd. Of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001) (internal quotation marks omitted). On the other hand, sovereign immunity "does not immunize political subdivisions of the state, such as municipalities and counties, even though such entities might exercise a 'slice of state power.'" *Ram Ditta v.*

Md. Nat. Cap. Park & Planning Comm'n, 822 F.2d 456, 457 (4th Cir. 1987) (quoting *Lake Country Estates, Inc. v. Tahoe Reg'l Plan. Agency*, 440 U.S. 391, 401 (1979)).

Neither side cites any decisions in which a court determined that, under *Lebron*, or any other test, a corporate defendant was part of state government and then proceeded to analyze whether the defendant was entitled to state sovereign immunity. Nor is any such caselaw readily identifiable. It may seem strained to rely on *Lebron* to determine whether UMMS is part and parcel of government for purposes of state action, and then deploy a separate test to determine whether UMMS is an arm of the state for purposes of sovereign immunity. Indeed, the inquiries are really synonymous and the arm-of-the-state analysis answers both questions. Nevertheless, the court will look to caselaw specific to the sovereign immunity inquiry — albeit caselaw specifically focused on whether a unit of government was state or local — to determine if UMMS is an arm of the state pursuant to the multifactor inquiry articulated in *Ram Ditta*, 822 F.2d at 457-58.

The Fourth Circuit has explained how *Ram Ditta* laid out four essential factors as to whether an entity is entitled to "Eleventh Amendment immunity":

> [T]his court has stated the formula as a four-part, non-exclusive inquiry: (1) whether the state treasury will be responsible for paying any judgment that might be awarded; (2) whether the entity exercises a significant degree of autonomy from the state; (3) whether

> it is involved with local versus statewide concerns; and (4) how the entity is treated as a matter of state law.

Ristow v. S.C. Ports Auth., 58 F.3d 1051, 1052 n.3 (quoting *Ram Ditta*, 822 F.2d at 457-48); *see also U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014) (identifying and applying the above "four nonexclusive factors").

As Plaintiff points out, the first of the *Ram Ditta* factors has been described as the most important. (ECF 47, at 29-30); *see, e.g.*, *Hess*, 513 U.S. at 49 (remarking that "the state treasury factor is the most important factor to be considered") (citation omitted); *Hutto*, 773 F.3d at 543 (same). And Plaintiff notes that the Supreme Court has observed that the first factor is "generally accorded . . . dispositive weight." *Hess*, 513 U.S. at 49.[9] Here, Defendants assert that the State would not pay any judgment against UMMS. (ECF 39-1, at 20) (citing Md. Code Educ. § 13-310).[10] Thus,

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[9] Although the *Ram Ditta* factors are referred to only obliquely in *Hess*, the Fourth Circuit quickly dispelled any suggestion that *Hess* had displaced the *Ram Ditta* test. *Gray v. Laws*, 51 F.3d 426, 431 n.2 (4th Cir. 1995) ("In the end, we do not believe that *Hess*, as it applies to single state entities, materially altered the Eleventh Amendment analysis we formulated in *Ram Ditta* . . . .").

[10] Section 13-310 is titled "Payment of obligations of Corporation." It provides:

> Obligations of [UMMS]:
> (1) Are payable only from assets of [UMMS]; and
> (2) Are not debts or obligations of the University or the State.

the first factor strongly suggests that UMMS is not an arm of the state.

The Fourth Circuit has indicated that the analysis may end if the first factor comes out the other way. "[I]f the state treasury will pay the judgment, the entity is immune from suit, and the other *Ram Ditta* factors need not be considered." *Harter v. Vernon*, 101 F.3d 334, 337 (4th Cir. 1996). But the opposite is true here. Moreover, in *Oberg* the Fourth Circuit concluded that the first factor weighed heavily against finding that the defendant was an arm of the state, but nonetheless considered the other three factors. 745 F.3d at 139-41. Therefore, it is appropriate to address the remaining factors.

Here, the second *Ram Ditta* factor regarding UMMS's autotomy is interrelated with the fourth factor, how UMMS is treated under Maryland law, and so the two are discussed in tandem below. The third *Ram Ditta* factor suggests that UMMS is an arm of the state. The Maryland General Assembly declared that UMMS was created to "provide medical care . . . for the citizens of the State and region," Md. Code Educ. § 13-302(1), and that such care "extend[s] to all citizens of the State . . . ." *Id.* § 13-302(2).[11] This language reflects an involvement with statewide concerns, rather

[11] Although St. Joseph may serve a more localized population than UMMS as a whole, Defendants do not differentiate the Hospital LLCs from UMMS for purposes of this analysis.

than local ones, thus tilting the third factor in favor of Defendants.

The fourth factor, which looks to the treatment of UMMS under Maryland law, points in the same direction. To be sure, the State legislature designated UMMS a "private, nonprofit, nonstock corporation" that is "independent from any State agency." Md. Code Educ. § 13-303(m). But the Court of Appeals of Maryland has determined that UMMS is an instrumentality of the State for purposes of Maryland's Public Information Act, notwithstanding the statutory language in § 13-303(m). *Napata v. Univ. of Md. Med. Sys. Corp.*, 417 Md. 724, 737 (2011). In reaching this determination, the *Napata* Court examined "[a]ll aspects of the interrelationship between the State and" UMMS. *Id.* at 733 (citation omitted) (alteration in original). The court summarized that examination as follows,

> [W]e agree with the Court of Special Appeals that "the attributes of UMMS's relationship with the State that point to its being an instrumentality of the State predominate over those pointing to its private character" . . . . UMMS did not exist until the State assets were transferred to the corporation. Its aim of providing health care to . . . Maryland residents serves a public purpose. Moreover, the State remains a visible and compelling force in UMMS's operations. All voting members on UMMS's Board of Directors are appointed by the Governor, and two of these flow from nominations by the respective leaders of each legislative chamber. Additionally, unlike an independent hospital, UMMS is not free to compete with the University for private gifts or private or

> federal grants, and its annual contracts must be approved by the Regents of the University [of Maryland]. Should UMMS become financially unstable, the Treasurer may loan State funds to UMMS as necessary. Finally, the Regents and the Board of Public Works have the power to dissolve UMMS if they determine that it is not fulfilling its purpose. In that event, UMMS's assets will revert to the State. These facts compel the conclusion that UMMS is an instrumentality of the State.

Id. at 737, (citation omitted).

Napata's in-depth assessment of the relationship between UMMS and the State is also pertinent to the second *Ram Ditta* factor, which concerns the degree to which UMMS exercises autonomy from the State. It is clear from *Napata* that, although UMMS may function like an independent corporate medical system in some respects, it is nevertheless tethered to State government and subject to State oversight in important ways. Notably, Plaintiff does not offer any argument as to this factor, or any of the *Ram Ditta* factors, other than the first. (*See* ECF 47 at 29-30). Moreover, had Plaintiff contended that UMMS is sufficiently autonomous from the State to tilt the second factor in his favor, he would have undermined the allegation in his Complaint that the State "continues to exercise ultimate authority and control over the governance of UMMS." (ECF 1, ¶ 20).

UMMS is an arm of the State for purposes of sovereign immunity.

The Fourth Circuit has identified three exceptions to the Eleventh Amendment's prohibition of suit against a state or an arm of a state. In *Lee-Thomas v. Prince George's County Public Schools*, 666 F.3d 244, 249 (4th Cir. 2012), it said:

> First, Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. [] *Garrett*, 531 U.S. [at] 363 . . . . Second, the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). . . . Third, a State remains free to waive its Eleventh Amendment immunity from suit in a federal court. *Lapides* [] 535 U.S. [at] 618 [].

(internal quotations omitted).

As to the third exception, relevant here, the test to determine whether a state has waived its immunity from suit in federal court is a "stringent" one. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985), *superseded on other grounds, as recognized in Lane v. Pena*, 518 U.S. 187, 198 (1996); *see FAA v. Cooper*, 566 U.S. 284, 290 (2012) (stating that a waiver of sovereign immunity occurs "only where stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction" and without recourse to legislative history); *accord Pense*, 926 F.3d 97, 101 (4th Cir. 2019); *Lee-Thomas*, 666 F.3d at 250-51; *see also Cunningham*. 990 F.3d at 365 (citing *Cooper*, 566 U.S. at 290)

(recognizing that "the Court explicitly and routinely construes ambiguous text so as to obviate any inference of waiver.")

Plaintiff contends that the Maryland legislature explicitly waived sovereign immunity for UMMS. He locates the purported waiver in Md. Code Educ. § 13-303(a)(2), which provides, in relevant part, that UMMS "shall not be a State agency . . . and is not subject to any provisions of law affecting only governmental or public entities." (*See* ECF 47 at 28). In essence, Plaintiff construes the second clause to encompass state sovereign immunity. (*See id.*).

Defendants counter that UMMS's authorizing statute expressly reserved sovereign immunity. (ECF 48, at 14). They point to Md. Code Educ. § 13-308(f), which states, "*Sovereign immunity not waived or abrogated*.- Nothing contained in this subtitle shall be deemed or construed to waive or abrogate in any way the sovereign immunity of the State or to deprive the University or any officer or employee thereof of sovereign immunity."

Of course, any waiver of sovereign immunity must be express and unequivocal.[12] *See Cunningham*, 990 F.3d at 365. Even assuming

[12] *Pense* is instructive on just how narrowly purported waivers are construed. 926 F.3d at 102. There, the Fourth Circuit considered whether a separate Maryland statute waived the State's sovereign immunity. That statute, Md. Code State Gov't § 20-903 provides: "The State, its officers, and its units may not raise sovereign immunity as a defense against an award in an employment discrimination case under this title." The court explained that because that language "does not 'specify the State's intention to subject itself to suit in *federal court*,' that provision cannot be

that the provision relied upon by Defendants does not pertain to UMMS specifically, Plaintiff's argument still fails because the statutory language he cites does not contain an express waiver of sovereign immunity. According to Plaintiff, the statement in § 13-303(a)(2) that UMMS "is not subject to any provisions of law affecting only governmental or public entities" constitutes waiver. Yet, neither the term "sovereign immunity" nor any reference to suit in federal court appears in the statute. Insofar as Plaintiff is suggesting that such waiver can be implied, he does not back up his claim with any legal authority. (*See* ECF 47, at 28). He draws only on *Napata*, which construed this statutory language expressly to exempt UMMS "from laws affecting only public entities." 417 Md. at 739-40. *Napata*, however, did not concern state sovereign immunity and thus has no bearing on this specific issue. Defendants are shielded by sovereign immunity on Counts I and II.[13]

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read to waive the State's Eleventh Amendment immunity." *Pense*, 926 F.3d at 102 (emphasis in original) (quoting *Atascadero*, 473 U.S. at 241).

[13] Defendants do not contend that sovereign immunity applies to Count III, under the ACA. Several trial courts have ruled that Congress validly conditioned receipt of federal funds on a consent to waive immunity, *see, e.g.*, *Kadel v. Folwell*, 446 F.Supp.3d 1, 17 (M.D.N.C. 2020); *Boyden v. Conlin*, 341 F.Supp.3d 979, 999 (W.D.Wis. 2018); *Fain v. Crouch*, 2021 WL 2004793 (S.D.W.Va. May 19, 2012). The ruling in *Kadel*, however, is currently on appeal before the Fourth Circuit, which heard oral argument in March. *Kadel v. N.C. State Health Plan*, No. 20-1409 (4th Cir. argued Mar. 11, 2021).

V. Count III: the ACA Claim

Section 1557, through its incorporation of Title IX, prohibits, *inter alia*, discrimination on the basis of sex and the denial of benefits on the basis of sex in any health program or activity receiving federal funding. To state a claim under Title IX, a plaintiff must also allege that he was harmed by a defendant's improper conduct. *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020).

Here, Mr. Hammons alleges that Defendants are responsible for a health program or activity that receives federal funds. (ECF No. 1, ¶¶ 14, 88). And, Plaintiff alleges that he was harmed by the cancellation of his scheduled hysterectomy at St. Joseph. (*Id.*, ¶ 60). Defendants do not take issue with the sufficiency of these allegations. Thus, the remaining question is whether Plaintiff alleges unlawful discrimination or denial of benefits on the basis of sex.

Neither side relies on the ACA's implementing regulations. Defendants point out that although the U.S. Department of Health and Human Services, under former President Trump, promulgated regulations that could have a bearing on this case, those "regulatory changes" have been enjoined. (*See* ECF 39-1 at 29 n.24) (citing *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Hum. Servs.*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Walker v. Azar*, 20-cv-2834 (FB) (SMG), 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020)). Rather

than substantively addressing the status and relevance of those regulations, Defendants chose to "reserve[] [their] right to present additional arguments based on those regulations." (ECF 39-1, at 29 n.24).

Nevertheless, during the pendency of this motion, Plaintiff submitted a "Notice of Supplemental Authority" that the Department of Health and Human Services ("HHS") has issued a new "Notification of Interpretation and Enforcement" that clarifies the protections granted under Title IX, and therefore § 1557, by extension. (ECF No. 50). It announces that, "This Notification is to inform the public that, consistent with the Supreme Court's decision in *Bostock* and Title IX, beginning May 10, 2021, the Department of Health and Human Services (HHS) will interpret and enforce Section 1557's prohibition on discrimination on the basis of sex to include: (1) discrimination on the basis of sexual orientation; and (2) discrimination on the basis of gender identity." (ECF No. 50-1, at 2).

Plaintiff, in turn, states:

> HHS's position supports Mr. Hammons's claim that by refusing to perform his hysterectomy in aid of his sex reassignment, while agreeing to perform hysterectomies not associated with sex reassignment, Defendants discriminated against him on the basis of sex. The Notification is therefore relevant, post-submission authority supporting Mr. Hammons's argument that Defendants' motion to dismiss the Section 1557 claim should be denied.

(ECF No. 50, at 2). He goes on to argue that "Fourth Circuit precedent also treats discrimination based on gender identity as sex-based discrimination and subject it to heightened scrutiny under the Equal Protection Clause." *Id.* (citing *Grimm*, 972 F.3d at 606).

Defendants' response attempts to distinguish *Grimm* by arguing that the St. Joseph's policy at issue here, unlike in that case, is facially neutral. They also argue that this recent HHS interpretation does not apply as "they were not in effect at the time Hammons alleges the conduct took place." (ECF No. 51, at 1-2). This latter argument fails to note Plaintiff's concession that this is "post-submission authority" and his reliance on HHS's guidance as merely persuasive support to his claim, and not any kind of binding authority.

This is all beside the point, as *Bostock* already made clear that the position stated in HHS's interpretation was already binding law. The Fourth Circuit looks to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which concerns employment, to guide the "evaluation of claims under Title IX." *Grimm*, 972 F.3d at 616; *see Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007). Thus, as the *Grimm* court explained, 972 F.3d at 616, the Supreme Court's decision in *Bostock*, 140 S. Ct. 1731, is consequential for claims brought under both statutes.

In *Bostock*, the Supreme Court held that discrimination on the basis of homosexuality or transgender status necessarily constitutes discrimination on the basis of sex, which is prohibited under Title VII. The plain language of Title VII, the Court observed, establishes a but-for causation standard. And, as noted, events often "have multiple but-for causes." Thus, "so long as the plaintiff's sex was one but-for cause" of an alleged discriminatory act, "that is enough to trigger the law." Further, the Court observed that transgender status and sex are inextricable. It opined, "Just as sex is necessarily a but-for *cause* when an employer discriminates against . . . transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking." (*Id.*, at 1739-44) (emphasis in original).

Here, St. Joseph's Chief Medical Officer, Dr. Cunningham, "ordered" the cancellation of Plaintiff's hysterectomy "because the surgery conflicted with the hospital's Catholic religious beliefs and the Catholic Directives." (ECF 1, ¶ 56). In particular, Dr. Cunningham informed Plaintiff's surgeon that the hysterectomy conflicted with the Directives' prohibition on sterilization, and their "command to preserve the 'functional integrity' of the human body." (*Id.*, ¶¶ 57-58).

Both the prohibition on sterilization and the imperative concerning bodily integrity permit exceptions. "Procedures that

induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." The Directives also allow the "functional integrity of the person [to] be sacrificed to maintain the health or life of the person when no other morally permissible means is available." Directives at 14 and 19.

In Plaintiff's view, his scheduled hysterectomy fell within the scope of both exceptions. His "treating physicians recommended," on the basis of the authoritative WPATH Standards of Care, that Plaintiff receive a hysterectomy as a medically necessary treatment for gender dysphoria." Moreover, Plaintiff "satisfied all of the criteria for a medically necessary hysterectomy under the WPATH Standards of Care." (ECF 1, ¶ 52). This included not only doctors' referral letters but a documented course of hormone therapy over the previous year. Nevertheless, Dr. Cunningham informed Plaintiff's surgeon that Plaintiff's condition of "gender dysphoria did not qualify as a sufficient medical reason to authorize the procedure," and that the Hospital "did not consider Mr. Hammons's gender dysphoria to be a valid basis under the . . . Directives to justify disrupting the body's 'functional integrity.'" (*Id.* ¶¶ 57-58).

In short, Mr. Hammons alleges that the Hospital denied Plaintiff the benefits of its services because he has gender dysphoria, a condition inextricably linked to being transgender.

Although Plaintiff's treating physicians had determined that hysterectomy was a medically necessary treatment for his condition, the Hospital refused to perform the surgery, specifically *because* it was linked to this condition. As explained in *Bostock*, a defendant who takes adverse action against someone for being transgender "inescapably *intends* to rely on sex in" his decisionmaking. 140 S.Ct. at 1742. Thus, Plaintiff alleges that the Hospital denied him the benefits of its services on the basis of sex, in violation of § 1557.

Moreover, Plaintiff alleges that St. Joseph recognizes the applicability of the pertinent exceptions contained in the Directives with other types of patients. For instance, surgeons at the Hospital "remove otherwise healthy tissue to prevent cancer or other diseases" and "perform purely cosmetic surgeries." (ECF 1, ¶ 58). Nonetheless, the Hospital regarded Plaintiff's medical need differently because he is transgender, and therefore cancelled his procedure. In this regard, Plaintiff alleges that the Hospital discriminated against him on the basis of sex by treating him "'worse than others who are similarly situated.'" *Grimm*, 972 F.3d at 618 (quoting *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 59, (2006)); *see Bostock*, 140 S. Ct. at 1740-44; *see also Kadel*, 446 F. Supp. 3d at 17 (concluding that the transgender plaintiff stated a sex discrimination claim under § 1557); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953

(D.Minn. 2018) (same); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090, 1099-1100 (S.D.Cal. 2017) (same).

Defendants' arguments do not require a different result. For one, Defendants assert that to state a claim of sex discrimination under § 1557, a plaintiff must allege that the discrimination was intentional and that it was a "'substantial' or 'motivating factor' for" the defendant's actions. (ECF 48, at 21) (quoting *Weinreb v. Xerox Bus. Servs., LLC Health & Welfare Plan*, 323 F. Supp. 3d 501, 521 (S.D.N.Y. 2018), *adhered to on denial of reconsideration sub nom. Weinreb v. Xerox Bus. Servs.*, No. 16-CV-6823 (JGK), 2020 WL 4288376 (S.D.N.Y. July 27, 2020)). Of course, *Weinreb* is not binding authority on this court; the Fourth Circuit has not employed the same language when articulating the standard for sex discrimination under § 1557 and Title IX.[14] Moreover, even if Plaintiff were required to allege that discrimination was a substantial or motivating factor in Defendants' actions, the Complaint would still pass muster. Plaintiff plainly alleges that his hysterectomy was cancelled and that therefore he was denied necessary medical treatment, purely because of his transgender status, and thus because of his sex. Under the logic and

[14] Since *Weinreb* was decided, the Second Circuit has articulated the pertinent standard differently. *See Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016) (stating that under Title IX, a complaint "is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of . . . discrimination").

instruction of *Bostock*, Defendants "inescapably" intended to rely on sex in their decisionmaking.

Mr. Hammons has stated a claim for sex discrimination under § 1557 of the ACA.

VI. Conclusion

For the foregoing reasons, the motion to dismiss will be granted as to Count I and Count II and denied as to Count III. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JESSE HAMMONS	:	
v.	:	Civil Action No. DKC 20-2088
UNIVERSITY OF MARYLAND MEDICAL SYSTEM CORPORATION, et al.	:	

MEMORANDUM OPINION

Plaintiff Jesse Hammons ("Plaintiff" or "Mr. Hammons"), a transgender man, sued Defendants, University of Maryland Medical System Corporation ("UMMS"), UMSJ Health System, LLC ("UMSJ"), and University of Maryland St. Joseph Medical Center, LLC ("St. Joseph") (collectively, "Defendants"), pursuant to Section 1557 of the Affordable Care Act ("ACA"), 42 U.S.C. § 18116(a), claiming sex discrimination in Defendants' refusal to allow him to have a hysterectomy performed at their hospital to treat his gender dysphoria. Two other claims, brought under 42 U.S.C. § 1983, for violation of the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, were dismissed on Defendants' motion (ECF No. 52). The motion was filed by all three defendants, as a unit, and contended, *inter alia*, that they are private corporations that cannot be sued under 42 U.S.C. § 1983, or, alternatively, if they are found to be state

actors, they are entitled to sovereign immunity on those claims.[1] In agreeing with Defendants on the latter argument, this court found that UMMS is an arm or instrumentality of the government for the purposes of Plaintiff's assertion of claims under § 1983 as well as for the purposes of sovereign immunity. This court treated the three Defendants "as a single entity for the purposes of" the motion to dismiss because Defendants treated themselves as such in their motion and the facts supported that approach. (ECF No. 52 at 22). Mr. Hammons subsequently moved for reconsideration or, in the alternative, certification of interlocutory appeal, and this court denied that motion. (ECF Nos. 56, 64). Defendants answered, and a scheduling order was entered.

Some months later, the three defendants moved for leave to amend their answer to plead two "alternative affirmative defenses based on the ecclesiastical abstention doctrine and Religious Freedom Restoration Act ('RFRA'), 42 U.S.C. §§ 2000bb, et seq." (ECF No. 73-1 at 2). They specifically recognized that these defenses would only apply if they were "private entities." (ECF No. 73-1 at 7). Plaintiff opposed the motion, arguing that the

[1] Defendants did not argue that sovereign immunity applied to the Section 1557 claim. Since this court decided the motion to dismiss, the United States Court of Appeals for the Fourth Circuit confirmed that "Section 1557 of the [Affordable Care Act] unequivocally conditions the receipt of federal financial assistance upon a state's waiver of sovereign immunity against suits for money damages." *Kadel v. N.C. State Health Plan for Tchrs. and State Emps.*, 12 F.4th 422, 439 (4th Cir. 2021).

court had already ruled that Defendants were not private entities, so any amendment to assert these defenses would be futile. (ECF No. 74 at 8). In reply, Defendants argued that, inasmuch as discovery remained ongoing, it was seeking to preserve these "alternative" affirmative defenses. (ECF No. 77 at 3). They suggested that further proceedings in this case might alter the court's earlier ruling that all three entities were state actors. In considering the motion, the court observed that all evidence of the defendants' status, governance, and operation was, and had been, in defendants' possession, but that an appeal was indeed possible, even likely. Despite the fact that it was not at all obvious how a RFRA defense would apply to a claim by a private person, or what role the ecclesiastical abstention doctrine might play, the court granted the motion. (ECF No. 81).

Now, discovery is complete, and both parties have filed motions for summary judgment. (ECF Nos. 98, 105). Also pending are motions to file certain documents under seal and others publicly, filed by both Plaintiff and Defendants. (ECF Nos. 100, 104, 113). The issues have been briefed, and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the following reasons, Plaintiff's motion for summary judgment will be granted, Defendants' motion for summary judgment will be denied, Defendants' motion to seal will be granted in part and denied in part, and Plaintiff's motions to seal certain documents and file

certain documents publicly will be granted in part and denied in part.

I. Factual Background

Unless otherwise noted, the following facts are undisputed. UMMS was created by Maryland statute in 1984 to provide medical care to the state and region. Md. Code, Educ. § 13-302. It is based in the University of Maryland and operates a system comprised of hospitals and member organizations.[2] *See About Us*, Univ. of Md. Med. Sys., https://www.umms.org/about (last visited Jan. 3, 2023). UMMS is bound by Maryland law to "operate the medical system without discrimination based upon race, creed, sex, or national origin." Md. Code, Educ. § 13-303(d).

St. Joseph is one of the hospitals that UMMS operates. It is a limited liability company ("LLC") with one member—UMSJ—that is wholly owned by UMMS. (ECF No. 99-4 at 4, 6). Thus, St. Joseph is a wholly owned subsidiary of UMMS. (ECF No. 105-10 at 5, 8, 23). All parties in this case refer to UMSJ and St. Joseph together as "St. Joseph" and do not distinguish between those two defendants—this opinion will do the same unless otherwise indicated.[3] (ECF Nos. 98-1 at 11, 105-1 at 15-16). UMMS directly

[2] The materials submitted by Defendants recite that there are ten member organizations. (ECF No. 98-4 at 3). The website lists eleven hospitals.

[3] Unlike earlier in this litigation, Defendants now try to separate the two St. Joseph entities from UMMS when this strategy

appoints two members of St. Joseph's board, must approve the appointment and removal of the CEO and President, and must approve certain board actions.[4] (ECF No. 99-4 at 6-8, 10, 23). All three Defendants have admitted that they have received federal funds in the form of "payments for patient procedures covered by Medicare and Medicaid."[5] (ECF No. 83 at 9). However, Defendants assert, and Plaintiff does not dispute, that St. Joseph directly receives its own stream of federal funds. (ECF Nos. 98-1 at 12, 98-7 at 3).

The medical center was owned and operated as a Catholic hospital by Catholic Health Initiatives prior to being purchased by UMMS. (ECF No. 99-1 at 8, 86). When UMMS purchased the medical

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better fits their purposes. Whether they succeed will be discussed later.

[4] The parties seem to dispute whether UMMS also has the authority to appoint the other sixteen members of St. Joseph's board. (ECF No. 111 at 19 n.1). St. Joseph's Operating Agreement provides that "The Member," UMSJ, "shall have the power and authority to elect all of the" other board members from a slate of nominees submitted by the Nomination/Governance Committee of the St. Joseph board, and at least one of the two directly-appointed UMMS directors shall serve on that committee. (ECF No. 99-4 at 10-11). However, the boards of St. Joseph LLC and UMSJ LLC consist of the same members. (ECF No. 99-1 at 86; *see also* ECF Nos. 105-6 at 13, 105-11 at 6). At a minimum, UMMS is indirectly involved in the selection of St. Joseph's entire board.

[5] While all three Defendants "admit they have received" federal funds, (ECF No. 83 at 9), it is unclear whether UMMS and UMSJ receive their own separate stream of federal funds or whether they receive federal funds indirectly through the hospitals they operate.

center in 2012, a condition of the "Asset Purchase Agreement" was that "UMMS . . . shall continue to operate [St. Joseph] in a manner consistent with Catholic values and principles," including complying with a "formal reporting mechanism" to ensure St. Joseph is held accountable for its "Catholic identity."[6] (ECF No. 99-1 at 86). Specifically, UMMS agreed to ensure that St. Joseph's board implemented the Ethical and Religious Directives for Catholic Health Services (the "ERDs"), as promulgated by the United States Conference of Catholic Bishops, in St. Joseph's provision of health care. (ECF No. 99-1 at 86). UMMS also agreed that at least one seat on St. Joseph's board would be a representative of the Archdiocese of Baltimore. (ECF No. 99-1 at 85).

Around the time of the sale, each of the defendants entered into a "Catholic Identity Agreement" with the Roman Catholic Archbishop of Baltimore, which provided a "framework within which to continue authentic Catholic traditions and practices" at St. Joseph. (ECF No. 99-2 at 2-3). This agreement provides that, every two years, St. Joseph "will undergo an audit of its adherence to the" ERDs by the National Catholic Bioethics Center. (ECF No. 99-2 at 8).

[6] The motion to seal this exhibit in its entirety will be denied without prejudice to the filing of a motion to redact certain portions upon a showing of need.

The ERDs provide, as relevant here, that "[d]irect sterilization of either men or women . . . is not permitted in a Catholic health care institution" but that "[p]rocedures that induce sterility are permitted when their direct effect is the cure or alleviation of a present and serious pathology and a simpler treatment is not available." (ECF No. 98-18 at 20). The ERDs also provide that "[t]he functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available." (ECF No. 98-18 at 15). The National Catholic Bioethics Center, which regularly audits St. Joseph for compliance with the ERDs, has issued a guidance document that states:

> Gender transitioning of any kind is intrinsically disordered[] because it cannot conform to the true good of the human person, who is a body-soul union unalterably created male or female. Gender transitioning should never be performed, encouraged, or positively affirmed as a good in Catholic health care. This includes surgeries, the administration of cross-sex hormones or pubertal blockers, and social or behavioral modifications.

(ECF No. 107-3 at 2).

Dr. Gail Cunningham, St. Joseph's Chief Medical Officer, was designated to testify on St. Joseph's behalf, pursuant to Fed.R.Civ.P. 30(b)(6), about St. Joseph's adherence to the ERDs,

among other things.[7] (ECF No. 105-1 at 15 n.2). In her deposition, she testified that she did not "have any reason to believe that" the National Catholic Bioethics Center's guidance did not apply at St. Joseph. (ECF No. 105-6 at 39). She also testified that St. Joseph "prohibits medical personnel from participating in all gender transitions or . . . gender[-]affirming treatments for transgender patients," for "both surgical and nonsurgical treatments." (ECF No. 105-6 at 57-58).

Mr. Hammons is a transgender man who has been diagnosed with gender dysphoria. (ECF No. 105-3). Gender dysphoria is a medical condition recognized by the International Classification of Diseases-10 and International Classification of Diseases-11, published by the World Health Organization, and by the Diagnostic and Statistical Manual of Mental Disorders, published by the American Psychiatric Association. (ECF No. 105-5 at ¶ 21). The World Professional Association for Transgender Health has issued guidelines (the "WPATH Standards of Care") for the clinical management of individuals with gender dysphoria that are widely recognized among healthcare professionals in the United States. (ECF No. 105-5 at ¶ 24). *See also Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 595 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021) (recognizing the WPATH Standards of Care as

[7] Defendants do not dispute this characterization of Dr. Cunningham's status as a deponent.

"represent[ing] the consensus approach of the medical and mental health community [for treating gender dysphoria that] have been recognized by various courts, including this one, as the authoritative standards of care"). According to the WPATH Standards of Care, "for many [transgender individuals], surgery is essential and medically necessary to alleviate their gender dysphoria." (ECF No. 105-5 at ¶ 28).

Mr. Hammons met with Dr. Steven Adashek, an attending physician at St. Joseph, on September 4, 2019, for a consultation regarding a hysterectomy to treat his gender dysphoria. (ECF Nos. 99-5 at 9, 107-6 at 5-7). A hysterectomy is a surgery to remove a person's uterus. (ECF No. 105-5 at ¶ 29). Dr. Adashek determined that a hysterectomy was the proper treatment for Mr. Hammons's gender dysphoria, and Dr. Adashek's office scheduled Mr. Hammons's surgery to take place at St. Joseph on January 6, 2020, based on Dr. Adashek's and Mr. Hammons's availability. (ECF No. 107-6 at 7, 9-12). To prepare for the surgery, Mr. Hammons underwent pre-operative blood tests, an echocardiogram, and other health screenings. (ECF No. 105-3 at ¶ 9).

On December 24, 2019, Dr. Adashek called Dr. Cunningham to discuss Mr. Hammons's upcoming surgery. (ECF No. 105-6 at 64). Dr. Adashek told Dr. Cunningham that he was scheduled to perform a hysterectomy on a patient for the purpose of gender transition, and Dr. Cunningham told Dr. Adashek, "[N]o, we cannot do

transgender surgery at St. [Joseph]." (ECF Nos. 105-6 at 64, 67-68). Dr. Cunningham testified that "the fact that it was a gender transition treatment . . . was enough to deny [permission to perform the surgery]." (ECF No. 105-6 at 69). On January 5, 2020, the night before the surgery, Dr. Adashek called Mr. Hammons to inform him that the surgery would have to be cancelled due to the fact that the surgery was for the purpose of treating gender dysphoria, as opposed to another medical diagnosis. (ECF Nos. 105-3 at ¶ 12, 107-6 at 13-14, 98-9 at 24, 26-27, 35). Mr. Hammons's surgery was rescheduled at another hospital, and after undergoing another round of pre-operative tests, he had a hysterectomy on June 24, 2020.[8] (ECF Nos. 99-6 at 33, 105-3 at 4).

On January 30, 2020, Dr. Adashek was asked to attend a meeting with Dr. Cunningham and other St. Joseph doctors to discuss Mr. Hammons's cancelled surgery. (ECF Nos. 105-6 at 70-71, 107-6 at 19-20). At the meeting, it was discussed that the surgery was cancelled because "[i]t was inconsistent with the ERDs." (ECF Nos. 105-6 at 74, 107-6 at 22).

Dr. Cunningham testified, on behalf of St. Joseph, that "hysterectomies are frequently performed . . . at St. Joseph to

[8] Mr. Hammons's rescheduled surgery was six months later in part because of the onset of the COVID-19 pandemic as well as Mr. Hammons's difficulty in taking time off from work for the surgery and recovery. (ECF Nos. 105-3 at 4, 107-6 at 32-33).

treat certain medical conditions" and that "putting aside gender dysphoria, [it is] true that so long as [a] hysterectomy is consistent with the standard of care for a given diagnosis, the hysterectomy may be performed [at St. Joseph]." (ECF No. 105-6 at 30, 57).

II. Standard of Review

A court may grant summary judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

"A party opposing a properly supported motion for summary judgment 'may not rest upon the mere allegations or denials of [his] pleadings,' but rather must 'set forth specific facts showing that there is a genuine issue for trial.'" *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) (quoting former Fed.R.Civ.P. 56(e)) (alteration in original). "A mere scintilla of proof . . . will not suffice to prevent summary judgment[.]" *Peters v. Jenney*, 327 F.3d 307, 314 (4th Cir. 2003). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Liberty Lobby*, 477

U.S. at 249–50 (citations omitted). At the same time, the court must construe the facts that are presented in the light most favorable to the party opposing the motion. *Scott v. Harris*, 550 U.S. 372, 378 (2007); *Emmett*, 532 F.3d at 297.

"When cross-motions for summary judgment are before a court, the court examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond v. PNGI Charles Town Gaming, LLC*, 630 F.3d 351, 354 (4th Cir. 2011). The court must deny both motions if it finds there is a genuine dispute of material fact, "[b]ut if there is no genuine dispute and one or the other party is entitled to prevail as a matter of law, the court will render judgment." 10A Charles A. Wright, et al., *Federal Practice & Procedure* § 2720 (4th ed. 2022). The court has an "affirmative obligation . . . to prevent factually unsupported claims and defenses from proceeding to trial." *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993) (internal quotation marks omitted).

III. Analysis

Plaintiff argues that he is entitled to summary judgment because the undisputed facts establish that Defendants have discriminated against him on the basis of his sex. (ECF No. 105-1 at 11-12). Defendants argue that they are entitled to summary judgment on three bases: 1) UMMS is not a proper defendant because St. Joseph was the relevant "funding recipient" under Section 1557,

not UMMS; 2) an injunction issued by the United States District Court for the District of North Dakota binds this court and requires dismissal; and 3) Defendants' conduct did not constitute intentional discrimination on the basis of sex. (ECF No. 98-1 at 8-9). Defendants also oppose Plaintiff's motion for those reasons and because 1) Plaintiff's positions rely on disputed facts about Defendants' policies and corporate relationships and 2) St. Joseph is protected by the Religious Freedom Restoration Act ("RFRA"). (ECF No. 111 at 8-9).

A. Plaintiff's Motion for Summary Judgment

Plaintiff argues that he is entitled to summary judgment because the undisputed facts establish that his surgery was cancelled because it "was meant to treat his gender dysphoria," and Defendants have a "policy of refusing to provide gender-affirming care." (ECF No. 105-1 at 27, 29). He argues that this constitutes discrimination on the basis of sex.[9] On the other hand, Defendants argue that the undisputed facts establish that they have not engaged in intentional sex discrimination because "the ERDs apply neutrally to all patients," and "the ERDs do not allow for St. Joseph to perform sterilization procedures (for

[9] The question of which, if any, of the Defendants may be held responsible for any sex discrimination will be discussed in later sections.

either sex) or procedures that result in the removal of a physically healthy organ." (ECF No. 98-1 at 28-29).

Section 1557 provides that

> an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of Title 29, . . . be subjected to discrimination under[] any health program or activity, any part of which is receiving Federal financial assistance[.]

42 U.S.C. § 18116(a).[10] Therefore, as under Title IX, Section 1557 prohibits discrimination "on the basis of sex." *See* 20 U.S.C. 1681. Upon review of the parties' statements of undisputed facts and the exhibits to their motions, the undisputed facts establish that the cancellation was discrimination on the basis of sex because it was pursuant to a policy against providing gender-affirming care—a policy that in practice permits all patients to obtain doctor-recommended, medically necessary hysterectomies, *except* transgender patients seeking treatment for gender dysphoria. Defendants' attempt to frame the policy as neutrally applicable is unavailing.

[10] Courts look to cases brought under Title VI, Title IX, Section 504 (section 794 of Title 29), and the Age Discrimination Act for guidance in interpreting this section. *See* 42 U.S.C. § 18116(a) ("The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.").

Dr. Cunningham, testifying as St. Joseph's Rule 30(b)(6) corporate designee, stated that St. Joseph "prohibits medical personnel from participating in all gender transitions or . . . gender[-]affirming treatments for transgender patients." (ECF No. 105-6 at 57). Defendants have identified no evidence that contradicts this statement. Additionally, undisputed evidence establishes that St. Joseph abides by the ERDs, as required by the Asset Purchase Agreement and Catholic Identity Agreement. And Defendants do not dispute that St. Joseph's interpretation of the ERDs corresponds with the guidelines promulgated by the National Catholic Bioethics Center as prohibiting gender-affirming treatment—Dr. Cunningham's testimony supports this as well. (ECF No. 105-6 at 39).

It may be true that St. Joseph prohibits medical personnel from performing hysterectomies on all individuals, regardless of sex, who do not have a medical need for that surgery—i.e., individuals who seek a hysterectomy solely for the purpose of elective sterilization. However, Mr. Hammons *did* have a medical need for his requested hysterectomy; he was not seeking a hysterectomy for the purpose of elective sterilization. He sought a hysterectomy to treat his gender dysphoria, as recommended by his doctor.[11] (ECF No. 98-1 at 15). Indeed, St. Joseph

[11] Dr. Cunningham confirmed that St. Joseph's "policy of not permitting gender transition treatments . . . does not depend on

"frequently" performs hysterectomies, even though they result in sterilization, on patients that have a medical need for that surgery—as long as the medical need is not from gender dysphoria.[12] (ECF No. 105-6 at 30). As Dr. Cunningham confirmed, St. Joseph will allow a doctor to perform a hysterectomy on any patient "so long as [a] hysterectomy is consistent with the standard of care for a given diagnosis," aside from gender dysphoria. (ECF No. 105-6 at 57). A hysterectomy is "consistent with the standard of care" for a gender dysphoria diagnosis, (ECF No. 105-5 at ¶ 28), but unlike other patients seeking a hysterectomy consistent with the standard of care for their respective diagnoses, transgender patients seeking to treat their gender dysphoria are turned away.

Therefore, the policy at issue here is not a neutrally-applicable prohibition on all hysterectomies, or even a prohibition on hysterectomies for the purpose of elective

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whether the treatment in question is a sterilization procedure." (ECF No. 105-6 at 59).

[12] Defendants attempt to narrow the exception to only allowing hysterectomies to treat "life-threatening" conditions. (ECF No. 98-1 at 14, 28). There is no evidence to support this characterization of the policy. Dr. Cunningham testified that the use of the term "life-threatening" does "not reflect a medical diagnosis" and instead is "used as a means to understand the implications of the ERDs on a particular procedure." (ECF No. 98-9 at 44). Other deposition testimony that Defendants cite in connection with this term confirms that "physicians aren't required to certify or verify that a patient suffers from a life-threatening condition before scheduling a hysterectomy." (ECF Nos. 98-1 at 13-14, 98-17 at 15).

sterilization—it is a prohibition on hysterectomies (along with other gender-affirming surgeries) that are sought by transgender patients for the purpose of treating gender dysphoria. Defendants have not identified any other medical diagnosis that St. Joseph excludes from treatment eligibility in this way; any non-transgender patient seeking a doctor-recommended, medically necessary hysterectomy would not be turned away by Defendants. Thus, the true basis for Defendants' refusal to perform the surgery was Mr. Hammons's transgender status.

Additionally, undisputed evidence establishes that Mr. Hammons's surgery was in fact cancelled because it was for the purpose of treating his gender dysphoria. Dr. Cunningham testified that when Dr. Adashek asked her if he could perform a hysterectomy on Mr. Hammons "for the purpose of . . . transgender surgery," she said, "[N]o, we cannot do transgender surgery at St. [Joseph]." (ECF No. 105-6 at 64). She confirmed that she knew nothing about the procedure or the patient, other than the fact that Mr. Hammons was transgender and sought a hysterectomy for the purpose of gender affirmation, and she stated repeatedly that the only reason she denied permission to perform the surgery was that "it was a gender transition treatment." (ECF No. 105-6 at 67-69). Defendants have not identified evidence that suggests that Mr. Hammons's surgery was cancelled for any other reason. Therefore, Defendants' position that the denial of Mr. Hammons's surgery had nothing to

do with his sex or gender identity is simply not supported by any evidence.

The next inquiry is whether maintaining a policy against providing gender-affirming care at St. Joseph and applying that policy to Mr. Hammons when cancelling his surgery is discrimination on the basis of sex. Recent decisions of the Supreme Court, the United States Court of Appeals for the Fourth Circuit, and district courts in the Fourth Circuit confirm that it is.

The Supreme Court held in *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), that employment discrimination against transgender individuals is sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Court explained that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 1741. Noting that discrimination occurs under Title VII if sex is one but-for cause of an alleged discriminatory act, the Court added that because "sex is necessarily a but-for *cause* when an employer discriminates against . . . transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its decisionmaking." *Id.* at 1739, 42. Applying that reasoning here, if a hospital has a policy against performing a surgery to treat gender dysphoria—a condition inextricably related to a person's sex—but will perform

that surgery to treat any other medical diagnosis, the hospital intentionally relies on sex in its decisionmaking.

Though less recent, the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), also provides a useful framework by which to analyze the present case. Six Justices agreed in *Price Waterhouse* that discrimination based on a person's nonconformance with sex stereotypes is sex discrimination. *Id.* at 250-51. Here, St. Joseph's policy is guided by the National Catholic Bioethics Center's interpretation of the ERDs as prohibiting gender-affirming care because it does not "conform to the true good of the human person, who is a body-soul union unalterably created male or female." (ECF No. 107-3 at 2). This policy, and the reasoning behind it, implicates sex stereotyping in that it prohibits treatment that facilitates patients' physical nonconformity to their sex assigned at birth. *See Boyden v. Conlin*, 341 F.Supp.3d 979, 997 (W.D.Wis. 2018) (applying sex-stereotyping theory in determining that a health insurance plan's exclusion of coverage for gender-affirming treatment constituted sex discrimination under Section 1557).

The Fourth Circuit has extended these principles to cases involving Title IX claims, which makes them also applicable to Section 1557 claims. In *Grimm v. Gloucester County School Board*, 972 F.3d 586, 616-17 (4th Cir. 2020), the Fourth Circuit applied the *Bostock* reasoning and held that a bathroom policy prohibiting

a transgender student from using the boys restrooms discriminated against him on the basis of sex, in violation of Title IX. The court explained that sex discrimination occurred because the school board necessarily referred to the student's sex to determine an "incongruence between sex and gender" in order to exclude him from the boys restrooms. *Id.* at 616. As part of its reasoning, the court relied on the fact that the student "had been clinically diagnosed with gender dysphoria, and his treatment provider identified using the boys restroom as part of the appropriate treatment," but "[r]ather than contend with [the student's] serious medical need, the [school board] relied on its own invented classification, 'biological gender,'" to deny him access to the boys restrooms. *Id.* 619.[13] Likewise in the present case, Mr. Hammons was diagnosed with gender dysphoria, and the treatment recommended for that diagnosis was a hysterectomy. But rather than recognize Mr. Hammons's medical need, Defendants cancelled his surgery based on a policy against treating gender dysphoria.

The Supreme Court and the Fourth Circuit have yet to extend the principles they have applied in employment and school discrimination cases to discrimination against gender-affirming

[13] The court added that the student may have also been discriminated against under the *Price Waterhouse* sex-stereotyping theory based on its policy that "punished [the student] for not conforming to his sex-assigned-at-birth." *Id.* at 617 n.15.

treatment in a healthcare setting.[14] However, multiple district courts in the Fourth Circuit have done so; because the facts in those cases are closely analogous to the facts in the present case, their reasoning is persuasive here.

In *Fain v. Crouch*, --- F.Supp.3d ---, No. 20-CV-0740, 2022 WL 3051015, at *1 (S.D.W.V. Aug. 2, 2022), transgender Medicaid participants sued the state agencies and officials responsible for administering the West Virginia Medicaid program for sex discrimination in the program's exclusion of the surgical treatment of gender dysphoria. The court summarized the facts and its conclusion as follows:

> [T]he exclusion in the healthcare plan precludes coverage for [certain] surgical treatments when a person is diagnosed with gender dysphoria. However, the same or similar surgical treatments are available to persons when the diagnosis requiring that treatment is not gender dysphoria. It is undisputed that the criteria determining whether or not such treatment is covered under

[14] Aside from the fact that there is no Supreme Court or Fourth Circuit precedent that directly addresses sex discrimination in the provision of gender-affirming healthcare, Defendants argue that *Bostock* and *Grimm* are distinguishable from the present case because in those cases, the application of the policy would have been different if the person's sex or transgender status were different. (ECF No. 98-1 at 32-33). In this case, they argue a hysterectomy still would not have been allowed if Mr. Hammons were a cisgender woman and would have been impossible if he were born with male sex organs. However, those hypotheticals do not reflect an application of the discriminatory policy at issue here, which is a prohibition on all gender-affirming care. Nor could any similar hypothetical do so because the policy can only apply to transgender individuals—that is what makes the policy discriminatory.

> the Medicaid Program hinges on a diagnosis—but when treatment is precluded for a diagnosis based on one's gender identity, such exclusion invidiously discriminates on the basis of sex and transgender status.

Id. Accordingly, the court granted the plaintiffs' motion for summary judgment, and denied the defendants' motion for summary judgment, on the plaintiffs' Section 1557 claim, among other claims. Citing *Bostock*, the court explained that because "a transgender identity is inherent in an individual who suffers from gender dysphoria," the exclusion of coverage for individuals seeking surgical treatment of gender dysphoria "cannot be understood without a reference to sex." *Id.* at 11.

Similarly, in *Kadel v. Folwell*, --- F.Supp.3d ---, No. 19-CV-272, 2022 WL 3226731, at *1 (M.D.N.C. Aug. 10, 2022), transgender individuals who receive health insurance through the North Carolina State Health Plan for Teachers and State Employees ("NCSHP") sued NCSHP—under Section 1557, Title VII, and the Equal Protection Clause—for its exclusion of coverage for gender-affirming treatments. The district court granted summary judgment on a Title VII claim in favor of one of the plaintiffs who was denied coverage by NCSHP for her gender-affirming surgery, and it denied the defendant's motion for summary judgment as to that claim. *Id.* at *29. The court explained that NCSHP covers the same or similar surgery if it is not "leading to or in connection with sex changes or modifications and related care." *Id.* at 28.

Therefore, had the plaintiff not been assigned the sex of male at birth, the treatments would not be to "change" or "modify" her sex. *Id.* The court concluded that, like in *Bostock*, the plaintiff's sex played "an unmistakable and impermissible role in the" decision to deny coverage. *Id.* (quoting *Bostock*, 140 S.Ct. at 1741-42). The court also concluded that, for those same reasons, NCSHP discriminated against the plaintiff for the purposes of Section 1557. *Id.* at 29. In a subsequent opinion, the court granted summary judgment for the plaintiffs on the Section 1557 claim. *Kadel v. Folwell*, No. 19-CV-272, 2022 WL 17415050, at *3 (M.D.N.C. Dec. 5, 2022).

Like in *Fain* and *Kadel*, at issue in the present case is a policy under which a certain surgery is available to individuals seeking treatment for medical diagnoses, as long as those diagnoses are not gender dysphoria. In other words, the criteria that St. Joseph employs in determining eligibility for hysterectomies "hinges on a diagnosis" being unrelated to transgender status. *Fain*, 2022 WL 3051015, at *1. And as the court in *Fain* explained, when treatment is prohibited because of one's diagnosis that is based on one's gender identity, the prohibition "invidiously discriminates on the basis of sex and transgender status."[15] *Id.*

[15] Although the evidence is uncontroverted that Mr. Hammons's surgery was cancelled primarily because of St. Joseph's policy against providing gender-affirming care, (*see* ECF No. 105-6 at 64 ("[N]o, we cannot do transgender surgery at St. [Joseph]")), it

Defendants necessarily and intentionally relied on sex in creating and enforcing a policy that prohibits treatment if a patient's medical need for that treatment is an incongruence between the patient's gender identity and sex assigned at birth. *See Bostock*, 140 S.Ct. at 1746; *Grimm*, 972 F.3d at 608.

Defendants' citation to *Polonczyk v. Anthem BlueCross & BlueShield*, 586 F.Supp.3d 648, 656-57 (E.D.Ky. 2022), is unhelpful. In that out-of-circuit district court case, a health insurance plan excluded all "cosmetic" procedures from coverage, which included certain gender-transition-related procedures. The court dismissed the plaintiff's sex discrimination claim, finding that she "fail[ed] to identify any documents or actions that support a finding that [she] was discriminated against because of her transgender status." *Id.* at 656. It added that because the plan excluded coverage for cosmetic surgeries categorically with limited exceptions, regardless of a plan participant's transgender status, it could not be inferred that the exclusion was intentional sex discrimination. The same is not true in the present case. Unlike in that case, Plaintiff has identified undisputed evidence

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is worth noting that the result would not change if St. Joseph were also motivated by its policy against sterilization and removing functioning body parts. In proving that sex discrimination has occurred, it is sufficient to demonstrate that sex was one but-for cause of the allegedly discriminatory action, even if other factors played a role. *See Bostock*, 140 S.Ct. at 1739.

that Defendants have a policy specifically against providing gender-affirming care. And Defendants have not identified any other medical diagnoses for which hysterectomies are prohibited other than gender dysphoria.

Defendants also rely on *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court held that discriminating against someone based on pregnancy was not the same as discriminating against someone based on sex under Title VII. Defendants argue that an analogy should be drawn between pregnancy status and transgender status because, like pregnancy, gender-affirming care is "unique (medically, ethically, etc.) such that treating [it] differently cannot be conflated with intentional discrimination against those with a transgender identity." (ECF No. 31-32).

However, Congress amended Title VII in response to that decision, and in doing so, it "unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision" by adding "pregnancy, childbirth, or related medical conditions" to the definition of "on the basis of sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 (1983) (citing 42 U.S.C. § 2000e(k)). The Senate Report accompanying those amendments explained that it was the Justices who dissented in *Gilbert* that had "correctly" interpreted Title VII's meaning. S. Rep. No. 95-331, at 2-3 (1977). The dissenters'

conclusion, which the Senate Report endorsed, was that "a classification revolving around pregnancy," is "[s]urely," "at the minimum, strongly 'sex related.'" *Gilbert*, 429 U.S. at 149 (Brennan, J., dissenting). The dissenters reasoned that when a company "devise[s] a policy that, but for pregnancy, offers protection for all [comparable] risks," it discriminates "on the basis of sex" in violation of Title VII. *Id.* at 160. The same reasoning applies here: Defendants have "devised a policy" that permits medically necessary, doctor-recommended hysterectomies for "all" diagnoses, "but for" gender dysphoria, which is surely, at the minimum, strongly sex related. That policy is thus barred under federal anti-discrimination law. Defendants cite no case law extending the flawed reasoning of the *Gilbert* majority to Section 1557 claims or cases involving transgender status, and given Congress's clear disapproval of that reasoning, this court will not do so here.

For the foregoing reasons, the undisputed facts establish that the decision to cancel Mr. Hammons' hysterectomy pursuant to a policy that prohibits gender-affirming care was discrimination on the basis of his sex.[16] The question of which, if any, of the

[16] In reaching this conclusion, this court does not rely on HHS regulations, given the uncertainty regarding their viability. *See Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 589-95, 599-600 (8th Cir. 2022) (describing the relevant regulatory history). However, it is notable that HHS filed a Notice of Proposed Rulemaking on August 4, 2022, which states,

Defendants is responsible for that discrimination will be discussed in the following sections.

B. Defendants' Motion for Summary Judgment and Opposition to Plaintiff's Motion

Defendants moved for summary judgment on two other grounds: 1) UMMS is not a proper defendant and 2) Plaintiff is bound by another court's injunction. Additionally, Defendants contend that this court cannot grant summary judgment for Plaintiff because 1) Plaintiff's position relies on facts in dispute, and 2) St. Joseph is entitled to raise a RFRA defense at trial. None of Defendants' arguments are persuasive for the reasons that follow.

1. UMMS's Liability under Section 1557

Defendants argue that UMMS is not a proper defendant for the alleged discriminatory conduct at issue in this case. They argue that only the funding recipient for the specific discriminatory

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"Discrimination on the basis of sex includes . . . discrimination on the basis of . . . gender identity." Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47916 (proposed Aug. 4, 2022) (to be codified at 45 C.F.R. § 92.101). It also states,

> In providing access to health programs and activities, a covered entity must not . . . [d]eny or limit health services sought for purpose of gender transition or other gender-affirming care that the covered entity would provide to an individual for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded."

Id. at 47918 (to be codified at 45 C.F.R. § 92.206).

program—which they argue is St. Joseph's surgery department here—can be held liable under Section 1557. (ECF No. 98-1 at 10-12). Because Section 1557, like Title VI, Title IX, and the Rehabilitation Act, is Spending Clause legislation that operates like a contract between the government and the recipient of federal funds in which the recipient agrees to comply with federally imposed conditions, they argue that "liability only attaches to the actual recipient of federal funds for its own misconduct occurring in its own program or activities." (ECF No. 98-1 at 18 (internal quotation marks and emphasis omitted)).

Defendants' argument is faulty for several reasons. It has never been established that only the entity directly responsible for the discriminatory program, and not the entity's parent corporation, can be held liable under Section 1557 or other Spending Clause legislation.[17] As previously noted, Section 1557 prohibits "discrimination under[] any health program or activity, any part of which is receiving Federal financial assistance." 42 U.S.C. § 18116(a). The term "health program or activity" is defined in the HHS regulations as "all of the operations of entities principally engaged in the business of providing healthcare that receive Federal financial assistance[.]" 45

[17] Notably, Defendants do not argue that only St. Joseph's surgery department is a proper defendant here, which it maintains is the relevant "health program or activity." (ECF No. 98-1 at 19).

C.F.R. 92.3(b) (2020).[18] UMMS is undoubtedly "principally engaged in the business of providing healthcare" through its network of hospitals; therefore, "all" of its "operations," which would seem to include the hospitals it runs, are under the umbrella of its health programs and activities.[19] A plain reading of the statute supports a conclusion that UMMS could be held liable under Section 1557 for discrimination that occurs in any of its hospitals.

[18] Various litigants have challenged the 2020 HHS regulations as arbitrary and capricious, and those challenges remain pending. HHS's August 4, 2022, Notice of Proposed Rulemaking proposes a revised definition of "health program or activity," but the proposed new definition is broader in scope and includes language almost identical to the previous definition. *See* Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47844, 47912 (proposed Aug. 4, 2022) (to be codified at 45 C.F.R. § 92.4). Recognizing the uncertainty regarding the regulations, courts have looked to the definitions in Section 504, Title VI, Title IX, and the Age Discrimination Act for additional guidance. *See T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 742-43 (7th Cir. 2022). The definitions of "program or activity" in those statutes are very similar to definition in the 2020 regulations. *See* 29 U.S.C. § 794(b) (defining "program or activity" as "all of the operations of"—among other entities—"an entire corporation, partnership, or other private organization, . . . which is principally engaged in the business of providing . . . health care . . . any part of which is extended Federal financial assistance."); 42 U.S.C. § 2000d-4a (same); 20 U.S.C. § 1687 (same); 42 U.S.C. § 6107(4)(same).

[19] *See T.S.*, 43 F.4th at 742-44 (interpreting "all of the operations" of a healthcare company to include an LLC it operated); *see also Doe One v. CVS Pharmacy, Inc.*, No. 18-CV-01031-EMC, 2022 WL 3139516, at *7-14 (N.D.Cal. Aug. 5, 2022) (interpreting "operations" to "encompass the activities of separate subsidiary entities of a business engaged in providing healthcare (as opposed to only such entity's internal operations)").

Defendants' position is also inconsistent with how other Spending Clause legislation is interpreted. The Supreme Court held in *Grove City College v. Bell*, 465 U.S. 555, 556 (1984), that the receipt by some students of federal financial aid triggers Title IX liability only for a college's financial aid program, not for the entire college. However, this decision prompted Congress to pass the Civil Rights Restoration Act of 1987 (the "CRRA"), which superseded *Grove City College* and clarified that "if any part of an educational institution receive[s] federal funds, the institution as a whole must comply with Title IX's provisions." Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29 (1988) (codified as amended at 20 U.S.C. § 1687); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 287 (2d Cir. 2004). Although a program within an entity is different from an entity's subsidiary, Title IX's legislative history undermines Defendants' position that Congress intended to limit the scope of Spending Clause legislation liability to only the parties to the federal funding "contract"—the government and the direct recipient of the funds. *See also T.S. ex rel. T.M.S. v. Heart of CarDon, LLC*, 43 F.4th 737, 744-46 (7th Cir. 2022) (discussing the CRRA's implications for Section 1557).

None of the cases Defendants cite for a limitation on Section 1557 liability support Defendants' position. Defendants rely most heavily on *Davis v. Monroe County Board of Education*, 526 U.S. 629

(1999), in which the Supreme Court held that the government's enforcement power under Title IX "may only be exercised against the funding recipient," and it may not be extended to "parties outside the scope of this power." *Id.* at 641; *see also id.* at 640 ("[A] recipient of federal funds may be liable in damages under Title IX only for its own misconduct."). This holding is inapposite here. The Court's holding in *Davis* was in the context of deciding whether a school board—a recipient of federal funds—could be held liable for the discriminatory conduct of a student. The Court held that the school board could not be held liable for the conduct of third parties who did not receive federal funds (i.e., students); however, it clarified that the board *could* be held liable for its own deliberate indifference to student-student harassment. *Id.* at 640-43.

Here, Defendants have all admitted that they have received federal funds, and St. Joseph is a wholly owned subsidiary of UMMS. (ECF Nos. 83 at 9, 105-10 at 5, 8, 23). Their relationship is clearly different from that of a school board and a student. All the other cases Defendants cite for their position are in this school district or university context. *See, e.g., Baynard v. Malone*, 268 F.3d 228, 237 (4th Cir. 2001); *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999); *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018 (7th Cir. 1997); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 901 (1st Cir. 1988).

Even if it were appropriate to stretch the holding in *Davis* to fit the facts of this case, Defendants' position still would fail. In *Davis*, 526 U.S. at 630, as well as *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998), the Supreme Court made clear that a school district *can* be held liable under Title IX for teacher-student or student-student sexual harassment if the school district is aware of the misconduct and fails to correct it. Assuming hypothetically that those cases apply here, as Defendants urge, UMMS is not only aware of, but is also responsible for, St. Joseph's adherence to the ERDs—and audits by the National Catholic Bioethics Center—by way of entering into the Asset Purchase Agreement and Catholic Identity Agreement.[20] Further, the control UMMS exerts over the St. Joseph board—through its approval of the CEO, appointment of board members, and approval of certain board actions—suggests that UMMS could remedy this discrimination

[20] Defendants resist this conclusion by arguing that "UMMS's agreement to *maintain* St. Joseph's Catholic identity is different from *causing* it." (ECF No. 111 at 13). This is a distinction without a difference, as *Davis* and *Gebser* require no such causal link. Even so, the hospital known as St. Joseph may have had a Catholic identity prior to being owned by UMMS, but St. Joseph, LLC did not exist until UMMS created it and bound it contractually to comply with the ERDs. Further, the attempt to characterize UMMS's involvement in St. Joseph's Catholic identity as passive is belied by the consistently active language in the Asset Purchase Agreement. (*See, e.g.*, ECF No. 99-1 at 86 ("UMMS . . . shall continue to operate [St. Joseph] in a manner consistent with Catholic values and principles," and "UMMS . . . shall ensure that [St. Joseph] establish[es] and maintain[s] the following fundamentals to hold [St. Joseph] accountable for [its] Catholic identity[.]")).

if it chose to do so, or at least cease allowing St. Joseph to operate within its network of hospitals.[21]

Additionally, other courts have determined that a parent corporation *can* be held liable under Section 1557 and other Spending Clause legislation when its subsidiary engages in discrimination. Analogous to this case, the United States Court of Appeals for the Eleventh Circuit held in *Silva v. Baptist Health S. Fl., Inc.*, 856 F.3d 824, 842 (11th Cir. 2017), that a parent organization, which operated two hospitals where alleged discriminatory conduct occurred, could also be held liable under the Rehabilitation Act for its subsidiaries' conduct. The court explained that, because the parent "own[ed] and operate[d] the hospitals at which [the plaintiffs] presented . . . and applie[d] its various policies and procedures to" the subsidiary hospitals, liability was not limited to the "direct service-provider." *Id.*

Similarly, in *T.S.*, 43 F.4th at 738-39, the United States Court of Appeals for the Seventh Circuit held that a healthcare provider was a proper defendant in a Section 1557 suit against its self-funded employee health insurance plan—a separate limited

[21] Defendants contend that the extent of UMMS's control over St. Joseph's decision to engage in discriminatory practices is in dispute. (ECF No. 111 at 29-30). However, there are no disputed *facts*; the parties simply have different interpretations of the legal implications of the unchallenged agreements that establish the relationships between Defendants and their obligations to comply with the ERDs. *See infra* Part III.B.3.

liability company ("LLC")—for alleged discrimination perpetrated by the insurance plan. While only the healthcare provider, and not the LLC it operated, received federal funds in that case, the court clarified that "'program or activity' in [S]ection 1557 is not limited to the discrete portion of [a company's] operations that receives Medicare and Medicaid reimbursements." *Id.* at 743. In other words, the Section 1557 obligations imposed on a parent company through its acceptance of federal funds include a duty not to discriminate through the actions of a company that it operates. *See also Doe One v. CVS Pharmacy, Inc.*, No. 18-CV-01031-EMC, 2022 WL 3139516, at *9 (N.D.Cal. Aug. 5, 2022) (holding that parent and subsidiaries were both proper defendants in a Section 1557 suit, even if only the parent received federal funds, because "[t]o ignore the overall interrelationship among the entities which, in the case at bar, design and implement the allegedly discriminatory program . . . would exalt form over substance and impair the effectiveness of the anti-discrimination provision of the [Affordable Care Act]").

At a minimum, UMMS can be held directly liable under Section 1557 for owning and operating a hospital that adheres to discriminatory policies—and ensuring it does so, as required by the contracts entered into by UMMS. For that reason, UMMS is not

entitled to summary judgment on this basis, nor does it prevent Plaintiff from succeeding on his summary judgment motion.[22]

2. *Religious Sisters of Mercy* Injunction

Defendants argue that St. Joseph is shielded from Plaintiff's Section 1557 claim by an injunction issued by the United States District Court for the District of North Dakota in *Religious Sisters of Mercy v. Azar*, 513 F.Supp.3d 1113 (D.N.D. 2021), *judgment entered sub nom. Religious Sisters of Mercy v. Cochran*, No. 3:16-cv-00386, 2021 WL 1574628 (D.N.D. Feb. 19, 2021). (ECF No. 98-1 at 22-28). In that case, Catholic organizations sued the United States Department of Health and Human Services ("HHS") and its Secretary in his official capacity, challenging an implementation of Section 1557 and its regulations. *Id.* at 1122. The plaintiffs argued that interpreting or applying Section 1557 to require them to perform gender-transition procedures violates RFRA.[23] *Id.* The court agreed, and it issued a permanent injunction:

> PERMANENTLY ENJOIN[ING] AND RESTRAIN[ING] HHS, Secretary Azar, their divisions, bureaus,

[22] Plaintiff also argues that UMMS can be held indirectly liable for its subsidiary's actions under a piercing-of-the-corporate-veil theory. (ECF No. 105-1 at 38-41). Because this court concludes that UMMS can be held directly liable for its participation in the alleged discrimination under the text of Section 1557 and Spending Clause legislation case law, it need not address this argument.

[23] The case also involved other parties and other claims not relevant here.

> agents, officers, commissioners, employees, and anyone acting in concert or participation with them . . . from interpreting or enforcing Section 1557 of the ACA . . . or any implementing regulations thereto against the Catholic Plaintiffs in a manner that would require them to perform . . . gender-transition procedures, including by denying federal financial assistance because of their failure to perform . . . such procedures or by otherwise pursuing . . . other enforcement actions.

Id. at 1153-54.

The "Catholic Plaintiffs" include two separate sets of plaintiffs, one of which the court referred to as the "Catholic Benefits Association Plaintiffs." *Id.* at 1131, 33. The Catholic Benefits Association ("CBA") is a "nonprofit corporation and Catholic ministry" whose membership includes "over 1,030 employers and 5,100 Catholic parishes" who "commit to providing benefits or services consistent with Catholic values." *Id.* at 1133. These plaintiffs included the unnamed members, "present and future," of the Catholic Benefits Association that meet certain criteria. *Id.* at 1154. In addition, the "Catholic Benefits Association Plaintiffs" included three named plaintiffs, who are members of the CBA. *Id.* at 1133.

Defendants explain that St. Joseph has recently joined the CBA, having met the criteria required to do so. (ECF No. 98-1 at 24). They argue that, therefore, St. Joseph is covered by this injunction.

HHS appealed the district court's grant of permanent injunctive relief to the plaintiffs, and since the Defendants filed their motion, the United States Court of Appeals for the Eighth Circuit issued an opinion affirming the district court's ruling in all but one respect. *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583 (8th Cir. 2022). The Eighth Circuit held that the district court erred in concluding that "CBA had associational standing to sue on behalf of its unnamed members" because the CBA had not identified particular members and their injuries. *Id.* at 601-02. Accordingly, the court "affirm[ed] the district court's grant of permanent injunctive relief to the plaintiffs except to the extent it recognizes the associational standing of the CBA" and remanded for further proceedings consistent with the opinion. *Id.* at 609.

The Eighth Circuit's recent ruling that CBA lacked standing to proceed on behalf of its unnamed members in the lawsuit puts into question the viability of St. Joseph's argument that it is covered, as an unnamed member of the CBA, by the *Religious Sisters of Mercy* injunction. However, as Defendants point out, the injunction is still technically in place until the district court acts on remand from the Eighth Circuit. (ECF No. 118). Regardless of how the injunction is revised on remand, Defendants' argument lacks merit.

Mr. Hammons was not a party to the lawsuit in North Dakota and is not enjoined by the terms of the injunction—only HHS and its agents are. Defendants argue that Mr. Hammons should be considered in privity with HHS, as a "third-party beneficiary" of the Spending Clause legislation "contract between the Government and the funding recipient," because a private plaintiff's right of action is only as extensive as HHS's enforcement power. (ECF No, 98-1 at 25). However, Mr. Hammons's private right of action is different from a potential enforcement action against St. Joseph by HHS. A private litigant sues for violations of Spending Clause legislation to vindicate his own rights and to recover damages only for himself, whereas an enforcement action by the government would be to terminate federal funding based on a funding recipient's "breach" of the Spending Clause legislation "contract." *See Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191 (4th Cir. 1999) ("Title VI creates a two-pronged attack on discrimination by federal funding recipients: direct action against those recipients by private parties and action by funding agencies to secure voluntary compliance or to terminate funds altogether." (citations omitted)). Therefore, an injunction against government enforcement is not the same as an injunction against private lawsuits.

To hold otherwise would be an improper extension of a federal court's equitable powers to individuals not party to a case who

did not have an opportunity to be heard. *See* Fed.R.Civ.P. 65(d) ("Every order granting an injunction . . . binds only . . . (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with any described in [(A) or (B)]."); *see also Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 13 (1945) ("The courts . . . may not grant an enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."); *Whole Woman's Health v. Jackson*, 142 S.Ct. 522, 535 (2021) ("[U]nder traditional equitable principles, no court may enjoin the world at large, or purport to enjoin challenged laws themselves." (internal quotation marks and citations omitted)). And equitable considerations weigh strongly against binding Mr. Hammons and St. Joseph under the injunction, given how different the parties' positions are from the parties in *Religious Sisters of Mercy*—St. Joseph's status as a state entity being a notable difference. *See infra* Part. III.B.4. This court will not apply the injunction to the parties in this case.

3. Disputes of Material Fact

Plaintiff contends that no material facts are in dispute with regard to the legal relationship of all three Defendants and their collective responsibility for the sex discrimination. (ECF No. 114 at 10). Defendants, however, argue that certain facts upon

which Plaintiff relies are in dispute—specifically those related to the corporate relationships between the parties and to St. Joseph's policies and motives. (ECF No. 111 at 28-34).

First, Defendants argue that it remains in dispute "whether UMMS directly 'caused' or 'forced' St. Joseph to discriminate and whether it was the 'final decisionmaker for the challenged practice.'" Defendants take issue with Plaintiff's characterization of the Asset Purchase Agreement as evidence that UMMS caused St. Joseph to discriminate, where there is no evidence that "St. Joseph would have abandoned its adherence to the ERDs had UMMS not acquired the hospital." (ECF No. 111 at 29). This "dispute" is neither factual nor material. Rather, it reflects a difference in characterization of undisputed facts. It is undisputed that UMMS purchased St. Joseph and that a condition of that purchase was that UMMS continue to operate St. Joseph as a Catholic hospital. It is also undisputed that Defendant St. Joseph, LLC was created by UMMS, and that UMMS signed agreements to bind that newly created LLC to adhere to the ERDs in its provision of medical care. Whether that amounts to "forcing" St. Joseph to adhere to the ERDs is more of a legal question than a factual one.

Regardless, the answer to that question is immaterial because it is only relevant, as explained previously, if the principles of *Davis* are appropriately applied to this case—this court does not

accept that premise. And even if *Davis* did apply, the Supreme Court held in that case that a school district could be held liable for merely remaining deliberately indifferent to harassment—causation is not required. *Davis v. Monroe County Board of Education*, 526 U.S. 629, 640-43 (1999). Purely undisputed facts establish that UMMS maintains a health program that discriminates on the basis of sex, so Defendants cannot evade summary judgment on that basis.[24]

Defendants contend that Plaintiff "also relies on disputed facts about St. Joseph's policies and motives," specifically that Mr. Hammons's surgery was "cancelled *because of* his gender dysphoria." (ECF No. 111 at 31). They argue that record evidence supports a conclusion that St. Joseph has a policy against performing hysterectomies for the purpose of sterilization and that it only performs hysterectomies if the patient's uterus was diseased or if the patient has some other life-threatening condition, like excessive bleeding. However, accepting the fact that St. Joseph has a policy against performing hysterectomies for the purpose of sterilization, that is irrelevant here because Mr. Hammons did not seek a hysterectomy for the purpose of

[24] Defendants also argue that disputed facts regarding corporate relationships exist as relevant for Plaintiff's veil-piercing theory. As previously noted, this opinion does not rely on that theory in determining that UMMS is a proper defendant. *See supra* note 25.

sterilization. And the evidence does not support that St. Joseph only allows hysterectomies to treat life-threatening conditions; while it certainly supports that St. Joseph *will* perform a hysterectomy to treat a life-threatening condition, the evidence conclusively shows that "life-threatening" is not a requirement. *See supra* note 15. Rather, with the exception of procedures sought by transgender patients to treat gender dysphoria, St. Joseph will perform any hysterectomy "so long as [it] is consistent with the standard of care for a given diagnosis." (ECF No. 105-6 at 30, 57).

More importantly, there is no evidence to support Defendants' assertion that Mr. Hammons's surgery was cancelled for either of those reasons. The undisputed evidence establishes that Mr. Hammons's surgery was cancelled because "it was a gender transition treatment." (ECF No. 105-6 at 67-69). Even accepting that St. Joseph does have those policies that, in other cases, may be a relevant consideration in authorizing a hysterectomy, St. Joseph specifically denied Mr. Hammons's surgery because of its policy against providing gender-affirming care. Defendants point to no evidence that suggests St. Joseph does not have such a policy, and St. Joseph's corporate designee admitted that it does. (ECF No. 105-6 at 57). And as previously noted, all that is required is that sex discrimination was one of the reasons behind a covered

entity's adverse decision, and undisputed facts establish that that is the case here. *See supra* note 18.

4. RFRA Defense

Finally, Defendants argue that even if they are not entitled to summary judgment for the reasons previously discussed, Plaintiff is not entitled to summary judgment against St. Joseph because St. Joseph is entitled to raise a RFRA defense at trial. (ECF No. 111 at 34-39).

The parties have, at times, engaged in a sort of legal gymnastics as they try to wend their way through the labyrinth of state action, sovereign immunity, standards of review, and statutory interpretation. Neither side has been immune to this malady. Plaintiff, as ably pointed out by Defendants, tried to find daylight between state action and sovereign immunity in a vain attempt to sustain an action under 42 U.S.C. § 1983. Defendants were content to sink or swim together when it seemed to suit their purposes, but now seek to differentiate themselves into two (but not three) separate entities. Pleading in the alternative, and even making alternative arguments, is entirely permissible. Relying on one set of facts which win the day and then arguing the opposite may not be. The doctrine of judicial

estoppel precludes such chicanery.[25] While the parties have not transgressed that line, they came perilously close.

Defendants have always taken the primary position that all of them are private corporations, not instrumentalities of the state, and thus cannot be liable under § 1983. They did argue, that if they are state actors for purposes of § 1983, they are also

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[25] The Fourth Circuit described the doctrine in *Martineau v. Wier*, 934 F.3d 385, 393 (4th Cir. 2019):

> As the Supreme Court has explained, judicial estoppel is an equitable doctrine, designed to "protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (internal quotation marks omitted). Typically, judicial estoppel is reserved for cases where the party to be estopped . . . has taken a later position that is "clearly inconsistent" with her earlier one; has persuaded a court to adopt the earlier position, creating a perception that "either the first or the second court was misled"; and would "derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750–51 (internal quotation marks omitted). Finally, and central to this case, there is the longstanding principle that judicial estoppel applies only when "the party who is alleged to be estopped *intentionally* misled the court to gain unfair advantage," and not when "a party's prior position was based on inadvertence or mistake." *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995) (emphasis added) (internal quotation marks omitted); *accord New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark*, 65 F.3d at 29).

entitled to sovereign immunity. So, while they succeeded in having those claims dismissed, it was not based on their primary argument. What they did argue, however, was that all three could be treated together, allowing presumably the two St. Joseph entities to benefit from the status of UMMS, and vice versa. At this stage, in contrast, Defendants seek to split the entities, so that, as discussed above, UMMS can argue that it is not responsible for discrimination by St. Joseph's, and St. Joseph's can argue that it may assert the RFRA defense. Despite this switch in strategy, Defendants' argument fails.

Because St. Joseph is a state actor, it simply may not assert this defense. As noted in connection with Defendants' motion for leave to amend answer to assert this defense, Defendants acknowledge that the defense is not available to state actors. (ECF No. 73-1 at 7). By the time Defendants sought to assert the defense, the court had ruled that they, as a single unit of three entities,[26] were entitled to sovereign immunity as to the § 1983 claims precisely because they were an instrumentality of the state. And St. Joseph has not sought reconsideration of that ruling.

[26] It is somewhat disingenuous for Defendants to suggest that Plaintiff or the court itself was responsible for treating the three defendants as a single entity, when their motion did precisely that, denoting the three as the "Medical System". That motion made no attempt to differentiate St. Joseph from UMMS for the purpose of state actor analysis, or any other. (*See* ECF No. 39-1).

Rather, Defendants seem to believe that they are free to dispute the facts that the court relied on earlier in this litigation. Consideration of those purported additional facts does not show that St. Joseph is not an instrumentality of the state.

The question is whether wholly owned subsidiaries of state actors are also state actors. There is very little case law addressing this issue, but the case law that does exist suggests that wholly owned subsidiaries of state actors are also state actors. *See Verdon v. Consol. Rail Corp.*, 828 F.Supp. 1129, 1132, 38 (S.D.N.Y. 1993) (holding that "a public-benefit corporation which is a wholly owned subsidiary of the" state transit authority "would clearly be a . . . 'state actor'"); *Gunter v. Long Island Power Auth./Keyspan*, No. 08-CV-498(RRM)(LB), 2011 WL 1225791, at *7-8 (E.D.N.Y. Feb. 15, 2011) (holding that a power company, which was a wholly owned subsidiary of a state power authority, was a state actor because it was "controlled by an agency of the state"); *Gherity v. Pfaff*, 216 F.Supp.3d 975, 979 (D.Minn. 2016) (holding that a county medical center, "as a subsidiary of" a county, was a state actor). This makes sense logically and for public policy reasons—the same rules that apply to a governmental entity should apply to a sub-entity that it operates.

The question is not whether some of the day-to-day operations of St. Joseph's are controlled within its own corporate structure, or who ultimately made the decision to prohibit Mr. Hammons'

surgery. Instrumentality of the state analysis, as discussed at length in this court's earlier opinion, depends on assessment of many factors. Defendants have not pointed to any facts that undermine the earlier conclusion.

If St. Joseph is not a state actor, the court would then need to assess a very difficult question: whether St. Joseph can assert a RFRA defense in this case brought by a private individual, given that RFRA prohibits only the "[g]overnment" from "substantially burden[ing]" a person's exercise of religion. 42 U.S.C. § 2000bb-1. While the Supreme Court and the Fourth Circuit have never addressed the issue of whether RFRA applies to suits involving only private parties, and there is a circuit split on the issue, the weight of circuit court authority tips in favor of a conclusion that it does not.

The three circuit courts that have allowed a private defendant's RFRA defense in a suit by a private plaintiff are feeble support for Defendants' position. The United States Court of Appeals for the Second Circuit held that a RFRA defense could apply to a suit brought by a private plaintiff in *Hankins v. Lyght*, 441 F.3d 96, 103 (2d Cir. 2006). However, the Second Circuit has since expressed doubt about the strength of the reasoning in that case, based on the text and operation of RFRA. *See Rweyemamu v. Cote*, 520 F.3d 198, 203-04, 203 n.2 (2d Cir. 2008). In *In re Young*, 82 F.3d 1407, 1416-17 (8th Cir. 1996), *vacated, sub nom.*

Christians v. Crystal Evangelical Free Church, 521 U.S. 1114 (1997), *reinstated, sub nom. In re Young*, 141 F.3d 854 (8th Cir. 1998), the United States Court of Appeals for the Eighth Circuit allowed a RFRA defense in a bankruptcy case. However, its reasoning in doing so was based on the fact that the bankruptcy court that heard the case was a "branch" of the government that would be implementing federal bankruptcy law—the unique bankruptcy context in that case makes it less persuasive in the present case. Finally, in *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit allowed a RFRA defense in a case involving both the Equal Employment Opportunity Commission and a private plaintiff; however, it did not analyze the question, let alone state whether RFRA would apply if the private plaintiff had sued alone.

On the other hand, multiple circuit courts have explicitly rejected the notion that RFRA can apply in a suit involving only private parties. The United States Court of Appeals for the Sixth Circuit held in *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill*, 617 F.3d 402, 410 (6th Cir. 2010), that "the [RFRA] defense does not apply in suits between private parties." It reasoned that "[t]he text of the statute makes quite clear that Congress intended RFRA to apply only to suits in which the government is a party." *Id.* The United States Court of Appeals for the Seventh

Circuit in *Listecki v. Off. Comm. of Unsecured Creditors*, 780 F.3d 731, 736 (7th Cir. 2015), held that, "[b]ased on RFRA's plain language, its legislative history, and the compelling reasons offered by our sister circuits, . . . RFRA is not applicable in cases where the government is not a party." *See also Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1042 (7th Cir. 2006), *abrogated on other grounds by Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2012) (stating that "RFRA is applicable only to suits to which the government is party" and referring to the Second Circuit's decision in *Hankins* as "unsound"). The United States Court of Appeals for the Ninth Circuit applied an "under color of law" requirement in *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-43 (9th Cir. 1999), and concluded that, in the absence of a nexus between a private party and the government, RFRA did not apply to that party.

Additionally, several district courts in this circuit have held that RFRA cannot apply in suits where the government is not a party. *See Billard v. Charlotte Catholic High School*, No. 3:17-cv-00011, 2021 WL 4037431, at *15-22 (M.D.N.C. Sept. 3, 2021) (analyzing the question extensively and concluding "that RFRA does not apply to suits between purely private parties"); *Doe v. Catholic Relief Servs.*, No. 20-cv-1815-CCB, 2022 WL 3083439, at *5-6 (D.Md. Aug. 3, 2022) ("This court finds as a matter of law that RFRA restricts the government rather than private parties,

and so [the defendant] may not assert RFRA as an affirmative defense against [the plaintiff's] claims."); *Goddard v. Apogee Retail LLC*, No. 19-cv-3269-DKC, 2021 WL 2589727, at *8 (D.Md. June 24, 2021) (dismissing a claim predicated on RFRA because it "places restrictions on the government, not private parties").

Other courts have been persuaded by the dissent by then Circuit Judge Sotomayor in *Hankins*. She reasoned as follows:

> Two provisions of the statute implicitly limit its application to disputes in which the government is a party. Section 2000bb-1(c) states that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a *government*" (emphasis added). In the majority's view, we should read this provision as "broadening, rather than narrowing, the rights of a party asserting the RFRA." Maj. Op. at 103. This interpretation would be questionable even if Section 2000bb-1(c) were the only provision of the statute affecting the question of whether RFRA applies to private suits. When read in conjunction with the rest of the statute, however, it becomes clear that this section reflects Congress's understanding that RFRA claims and defenses would be raised only against the government. For instance, section 2000bb-1(b) of RFRA provides that where a law imposes a substantial burden on religion, the "*government*" must "demonstrate[] . . . that application of the burden" is the least restrictive means of furthering a compelling governmental interest (emphasis added). The statute defines "demonstrate" as "meet[ing] the burdens of going forward with the evidence and of persuasion." 42 U.S.C. § 2000bb-2(3). Where, as here, the government is not a party, it cannot "go[] forward" with any evidence.

441 F.3d at 114-15 (Sotomayor, J., dissenting) (alterations in original). If St. Joseph were not a state actor, the growing weight of authority recited above would counsel in favor of finding that it could not assert RFRA in a case brought by a private party.

For the aforementioned reasons, RFRA is not applicable in this case.

C. Resolution of Cross-Motions

This court has determined that undisputed facts establish that, as a matter of law, Defendants discriminated against Plaintiff on the basis of his sex; UMMS is a proper defendant—all three Defendants are health programs or activities that receive federal funds; St. Joseph is not covered by the *Religious Sisters of Mercy* injunction; there are no material facts in dispute; and St. Joseph may not assert a defense based on RFRA. In light of those determinations, Plaintiff is entitled to summary judgment in his favor on his Section 1557 claim, and Defendants' motion for summary judgment will be denied.

Any remaining questions as to damages—to the extent that there are any—are reserved for trial.

D. Motions to Seal and/or File Certain Documents Publicly

Finally, the following motions by the parties related to the sealing of documents are pending:

1. Defendants' Motion for Leave to File Exhibits Under Seal (ECF No. 100)

2. Plaintiff's Consolidated Interim Sealing Motion, Motion for Leave to File Certain Documents Under Seal, and Motion for Leave to File Certain Documents Publicly (ECF No. 104)

3. Plaintiff's Consolidated Interim Sealing Motion, Motion for Leave to File Certain Documents Under Seal, and Motion for Leave to File Certain Documents Publicly (ECF No. 113)

In compliance with to the parties' Stipulated Order Regarding Confidentiality of Discovery Material, (ECF Nos. 69, 70), the parties filed certain materials designated "confidential" under seal and moved simultaneously for leave to file them under seal, pursuant to Local Rule 104.13(c). Local Rule 105.11 provides that motions to seal "shall include (a) proposed reasons supported by specific factual representations to justify the sealing and (b) an explanation why alternatives to sealing would not provide sufficient protection." However, a "more rigorous First Amendment standard" applies "to documents filed in connection with a summary judgment motion in a civil case," as "summary judgment adjudicates substantive rights and serves as a substitute for a trial." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252-53 (4th Cir. 1988). Each motion will be addressed in turn.

1. Defendants' Motion to Seal

Defendants moved to file Exhibits 2, 7, 10, 13, 15, and 19 to their motion for summary judgment under seal. (ECF No. 100). Exhibits 10, 15, and 19 are excerpts from depositions that contain "confidential information regarding" Plaintiff's and other

individuals' "medical history and diagnoses." Plaintiff does not oppose the filing of those documents under seal. (ECF No. 102). Accordingly, the motion will be granted as to those documents.

The other exhibits are documents related to Defendants' corporate formation, structure, and contractual obligations: Exhibit 2 is the Asset Purchase Agreement, Exhibit 7 is the Catholic Identity Agreement, and Exhibit 13 is the St. Joseph Operating Agreement. Defendants argue that those documents contain "proprietary business information including internal policies and procedures which, if made public could cause competitive harm." They add that redaction or less drastic alternatives are not possible because "redaction will not allow the [c]ourt to fully evaluate the testimony and information provided in these exhibits." Plaintiff opposes the motion because the documents "go to the heart of the dispute in this case."

This opinion relies on and quotes heavily from those three agreements. Therefore, the First Amendment requires that they remain unsealed except "on the basis of a compelling . . . interest, and only if [the sealing] is narrowly tailored to serve that interest." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). Defendants' assertions of risks of "competitive harm" are too vague and overbroad, and sealing the entirety of the three documents is not narrowly tailored to serve any potential interest in doing so. And Defendants' reason for

rejecting less drastic alternatives is unpersuasive. As Plaintiff points out, Defendants could seek to file redacted versions of the documents publicly, while filing unredacted versions with the Court under seal. Therefore, Defendants' motion will be denied as to Exhibits 2, 7, and 13 to their motion for summary judgment. Should they seek to, they can file another motion to seal with proposed redactions to those documents. In doing so, however, they must clearly substantiate the basis for any requested redactions. The documents will remain under seal for another 14 days, although this memorandum is not under seal. Thus, the excerpts quoted or referenced herein must, at some point, be unsealed.

2. Plaintiff's First Motion to Seal and File Publicly

Plaintiff moved to file Exhibits 2, 11, 19, and 20 to his motion for summary judgment under seal. (ECF No. 104). Those documents are a letter and depositions that contain Plaintiff's medical information. Defendants do not oppose the motion as to those documents. (ECF No. 108). Accordingly, the motion to seal those documents will be granted.

Plaintiff also moved to file publicly Exhibits 13, 14, 16, and 22 to his motion for summary judgment, which were designated "confidential" under the Stipulated Order. (ECF No. 104). Exhibit 13 is a copy of a policy document from the National Catholic Bioethics Center, which is available publicly. Defendants agree

that there is no reason to seal a publicly available document, so they do not oppose Plaintiff's motion as to that document. (ECF No. 108). However, Defendants oppose the public filing of the other three documents: Exhibit 14 is a copy of the results of the National Catholic Bioethics Center's 2019 audit of St. Joseph; Exhibit 16 is an email chain among St. Joseph personnel about whether a phalloplasty could be performed on a transgender male at St. Joseph; and Exhibit 22 is an email chain among St. Joseph personnel after the events in this case about creating an alert when the word "gender" appears in a surgery scheduling request.

Defendants argue that Exhibits 14 and 22 "contain sensitive business information that is not otherwise available to the public" and that could cause "competitive harm" if disclosed. (ECF No. 108). They argue that Exhibit 16 contains sensitive personal health information about a patient, and that even though the patient's name is not included, there is still a risk that public disclosure of the document could lead to the patient being publicly identified.

Although this opinion does not rely directly on any of those three documents, they are relevant to the issues decided in the motions for summary judgment, so First Amendment considerations require careful scrutiny of the need to file them under seal. Defendants have not elaborated on what "competitive harm" could result from public access to the results of the audit or the

conversations about flagging diagnoses involving "gender." And the email conversations surrounding whether a penile reconstruction surgery could occur at St. Joseph do not contain any personally identifiable information—the personnel speak in general terms about the surgery sought and whether it would violate the ERDs. Defendants' opposition is devoid of any "specific factual representations to justify" sealing any of those three documents. Because Defendants have not made a sufficient showing as to why these documents should be sealed, Plaintiff's motion to file publicly as to those documents will be granted as well.

3. Plaintiff's Second Motion to Seal and File Publicly

Plaintiff moved to file Exhibit 1 to his reply memorandum, (ECF No. 114), under seal, and Exhibit 3 to that memorandum publicly. (ECF No. 113). The parties stipulated and "agreed that a public version of Exhibit 3 [to Plaintiff's Reply] containing the redactions proposed" may be filed. (ECF No. 116). They attached a proposed redacted exhibit. (ECF No. 116-1). Defendants did not file a response in opposition to filing Exhibit 1 under seal. Exhibit 1 contains additional portions of the same deposition testimony in Exhibit 10 to Defendants' motion for summary judgment, which the parties agreed to seal because it contains plaintiff's medical information. However, the single page in Exhibit 1 to Plaintiff's reply memorandum does not contain any personal medical information about anyone. Seeing no

legitimate justification for sealing the document, Plaintiff's motion will be denied as to Exhibit 1; it will be granted as to the agreed-upon redacted version of Exhibit 3.

IV. Conclusion

For the foregoing reasons, Plaintiff's motion for summary judgment will be granted, Defendants' motion for summary judgment will be denied, Defendants' motion to file documents under seal will be granted in part and denied in part, Plaintiff's first motion to file certain documents under seal and certain documents publicly will be granted, and Plaintiff's second motion to file certain documents under seal and certain documents publicly will be granted in part and denied in part. A separate order will follow.

/s/
DEBORAH K. CHASANOW
United States District Judge